# Petition

81-1043

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IN THE

# Supreme Court of the United States

October Term, 1981

No.

FEDERAL PRESCRIPTION SERVICE, INC., *et al.*
*Petitioners,*

v.

AMERICAN PHARMACEUTICAL ASSOCIATION,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the national association of pharmacists may claim *Noerr* exemption for its successful petitioning of a national private organization made up of the members of the 50 state pharmacy boards, in order to secure state laws and regulations which would further its antitrust objectives?

2. Whether petitioners' non-*Noerr* injuries were sufficiently proven?

3. Was it error to deny future damages?

4. Did the individual petitioners suffer compensable damages?

## PARTIES

Other than the captioned parties, the following were named by the District Court as co-conspirators:

All state pharmacy associations

The National Association of Boards of Pharmacy ("NABP")

The Iowa Board of Pharmacy Examiners (reversed on appeal)

The American College of Apothecaries, ("ACA")

William S. Apple, President, American Pharmaceutical Ass'n.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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### OPINIONS BELOW

1. United States Court of Appeals for the District of Columbia Circuit, ____ F.2d ____, 1981), Appendix A, p. 1a.

2. United States District Court for the District of Columbia (Gesell, J.)

(a) *Federal Prescription Service, Inc., et al.* v. *American Pharmaceutical Association,* 471 F.Supp. 126, (1979); Appendix E, p. 83a.

(b) id., 484 F.Sup. 1195 (1980); Appendix C, p. 41a.

## JURISDICTION

The jurisdiction of this Court arises under 28 U.S.C. § 1254(1), this petition being filed within 90 days after September 8, 1981 as provided by 28 U.S.C. § 2101(c).

## STATUTES INVOLVED

### U.S. CONSTITUTION, AMENDMENT 1

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

### 15 U.S.C. § 1

*Trusts, etc., in restraint of trade illegal; . . .*

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ."

### 15 U.S.C. § 15

*Suits by persons injured; amount of recovery*

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found of has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

## STATEMENT OF THE CASE

The corporate petitioner ("Federal") is a mail service pharmacy, the respondent ("APhA"; "American") is the national association of pharmacists (3a). The action ws brought under 15 USC § 15 and raises the question of whether the relief granted by the antitrust laws is available to redress the injuries which resulted to petitioner from a campaign conducted by APhA and its associates against the mail distribution of prescription drugs.

The underlying issue is whether the residents of rural America should have access to discounted drug services through mail service pharmacies. A mail service pharmacy is one that receives and fills prescriptions sent to it in the mails (43a). It secures the major volume of its business by advertising discounts on prescription drugs and uses this cost differential to attract business from patients who are price-conscious and are not compelled to use the more immediate services of the corner drug store (44a).

National sales of these prescription drugs amount to $10 billion a year (42a). To the extent that prescriptions are sent to mail pharmacies, the volume of the local drug store is diminished (43a).

Local practitioners of pharmacy are unified at both state and national levels. To a degree not generally realized, their associations exercise a coordinated power to restrict the nature of any competition in prescription drug sales by controlling the permissible standards of "ethical" pharmacy practice (53a).

> "A principal effort of APhA has been to unify all aspects of pharmacy retailing so that the pharmacy industry would, as APhA describes it, speak with one voice." (52a)

Pharmacist organization starts with 50 state Associations (54) many of whom by local law have the power to either name or nominate the persons who will then be appointed as members of the state's Board of Pharmacy (54a). Using Federal's home state of Iowa as an example, each of the members of the Iowa Board of Pharmacy Examiners had not

only been designated to be such by the Iowa Pharmaceutical Association, but, not surprisingly, each was also a member of the latter organization (56a).

On the national level, state Association representatives constitute APhA's controlling body, known as its "House of Delegates" (53a). In their capacity as Delegates they meet annually and by their votes determine what national limitations on pharmacy practice will be advocated by APhA in its trade publications or defined as impermissible forms of practice in its Code of Ethics (49a).

Boards of Pharmacy constitute an essential aspect of pharmacist organizational unity and have the power to determine who will be licensed as a pharmacist (54a) and what type of business he will be allowed to conduct thereafter (54a). Upon appointment as a member of a state Board they are automatically made members of an organization known as the National Association of Boards of Pharmacy ("NABP") where their collective vote by states determines the recommendations which NABP will make as to preferred forms of national pharmacy practice (54a).

NABP is the private Chicago organization through which APhA secured the assistance of the state pharmacy Boards. Although NABP was found to be a co-conspirator, its constituent Boards—except Iowa—were not (7a, 54a). By charter provision until 1974, the NABP membership met in annual convention at the same time and place as APhA (54a) and the trial court found NABP had assisted APhA directly in the effectuation of its policies against mail order distribution and prescription drug advertising even though it ". . . was aware of APhA's economic objectives." (55a) The nature of the APhA/NABP relationship underlies the *Noerr* question in this case. NABP resolutions are sent out to all state Boards through its publications—usually in the form of recommendations for action through the promulgation of official regulations, (55a).

A third national organization which also shared APhA's concern about the loss of business to mail service pharmacies was

the self-descriptive National Association of Retail Druggists ("NARD") (47a). NARD was dismissed from the case on summary judgment (64a) on the ground that its activities in support of APhA's campaign were either privileged under *Noerr*, or inconsequential (471 F.Supp. 126, reprinted here at page 83a *et seq.)*.

The campaign against the business of selling prescription drugs by mail was launched in 1960 (47a). In that year APhA, NABP and APhA's National Conference of State Pharmaceutical Association Executives ("NCSPAE") jointly called a meeting of the representatives of all organizations of community pharmacists for the conceded purpose of devising methods of eliminating existing mail pharmacies and preventing any further expansion of this form of competition. This 1960 meeting was attended not only by the executives of the three sponsoring organizations but by a large number of state Board members (48a).

APhA (*i.e.* the state Associations) undertook to move against mail pharmacy by securing the assistance of related organizations, amending its Code of Ethics (48a) and researching the methods whereby prohibitory suits could be instituted against mail pharmacies in the courts. NABP and its Board members were to use their legal powers to advance the objectives of the group (47a).

NABP republished the 1960 meeting proceedings to all state Boards (48a) and on APhA's further explanation of its case against mail pharmacy, the NABP members adopted anti-mail order and drug advertising resolutions similar to those passed by APhA's House of Delegates (55a). The appeal by APhA through the NABP to its members appears to be the "lobbying" which is referred to in general terms in both opinions below—and, if so, is the "petition" conduct on the basis of which the *Noerr* exemption was allowed.

The District Court found that APhA credited itself with having caused some sixteen cease and desist orders to be issued by

state Boards against Federal (55a). In addition, 6 states adopted laws or regulations prohibiting any form of mail order pharmacy practice, and 30-35 states forbade any pharmacies to advertise prescription drugs (down to 24 by 1974) (51a, 71a).

The District Court also found that Federal's home state agency, the Iowa Board of Pharmacy Examiners, had continually harassed it "often without regard to the requirements of Iowa law" (56a). These bindings were described by the Court of Appeals:

> "The Board, the court found, undertook a series of actions against Federal, several of them unlawful. The Board first denied Federal's license application, granting it only after being told by the Iowa Attorney General that state law did not prevent issuance of a pharmacy license to a mail order house. Then in 1964, the Board delayed the grant of Federal's change of address license. *The Board* also imposed burdensome inspection conditions on Federal, and *cooperated with pharmaceutical associations in Iowa and Nebraska in preparing forged prescriptions to be sent to Federal. In 1965, on the basis of these filled prescriptions, the Board revoked Federal's pharmacy license,* but Federal succeeded in Iowa state court in having the revocation annulled. In 1968 the Board attempted to seize Federal's inventory pursuant to a search warrant, but withdrew the warrant after Federal filed suit to prevent the search and before any seizure was effected. In 1970 the Board withheld Federal's annual relicensing. In 1973 the Board induced the state to seek to have Federal enjoined from filling out-of-state prescriptions, but the action was dismissed and the Iowa Supreme Court affirmed the dismissal. Finally, in 1966, the Board denied Federal's request to be certified as a suitable employer of pharmacist interns. The reason for the denial, the court found, was that Federal did not belong to the Iowa Pharmaceutical Association." (9a-10a) (Emphasis added)

NARD joined with APhA to procure the assistance of the American Medical Association in the campaign against mail

order pharmacy. They were successful in causing the AMA to adopt a resolution which, as described by the trial court,

> "[called] upon doctors to encourage their patients, except in rural sections, not to use mail order prescription services." (52a)

APhA revised its Code of Ethics by a series of steps over the years to forbid members from seeking or retaining employment in mail service pharmacies, to prohibit any member from advertising for business, and making it a condition of continued membership that member pharmacists resign from any employment with non-member drug store owners who failed to abide by these new standards (49a). To enforce these provisions, APhA appointed a Judicial Board with power to hear and debar members whom it found to be guilty of Code violations (49a).

These changes in the APhA Code had a national effect—even apart from their direct application to APhA's membership. Eighteen state Associations adopted the new Code as the standard of practice for their own memberships, and six Pharmacy Boards adopted APhA's new Code as a statewide standard of professional practice (51a). Seventeen state Associations entered into "affiliation" agreements with APhA, which required them to adopt APhA's new Code as their own practice standard controlling over the Association's membership, an agreement which also required that all new members of the state Association become members of APhA (53a).

In other areas affecting pharmacist policy APhA urged students not to go to work for mail pharmacies (34a), asked publications not to accept mail service advertising (34a), and attempted to discourage persons who showed an interest in starting mail pharmacies (51a). APhA's chief executive

> ". . . spearheaded APhA's opposition to mail order sales and was a vigorous opponent of mail service pharmacies. He travelled throughout the country to make speeches on behalf of APhA, and wrote numerous articles in which he constantly attacked mail order pharmacies and emphasized

> the need to uphold the Code of Ethics and rulings of the Judicial Board. Mail order prescription was pictured as a "scheme" that threatened to destroy community pharmacy service . . . In this fashion, with the aid of APhA's publications, Apple largely succeeded in uniting the profession to a concerted opposition to mail order pharmacies." (55a-56a)

On this factual showing the trial court sitting as a jury concluded that APhA, NABP, the state Associations which formed APhA, and the Iowa Pharmacy Board were each co-conspirators in a group boycott whose objective was to destroy the mail order pharmacy business—and that their conduct in this regard constituted a *per se* violation of the antitrust laws (63a).

The trial court further held:

> "In addition to general opposition to mail order pharmacies the boycott was specifically directed against Federal. The conduct of APhA and its co-conspirators had the intended and necessary effect of excluding or impeding Federal and other mail order pharmacies from access to retail customers." (63a)

This causal link having thus been established, Federal then submitted to the trial court proofs of the injuries which it traced to the anti-mail order campaign. As found these were:

> A loss of business of half a million dollars annually in the 1972-1977 period (37a).
>
> The partial limitation of Federal's interstate business as a result of receiving the state cease and desist orders (71a).
>
> Federal's legal expenses in the Massachusetts and Iowa litigations, which, when added to Federal's lobbying expense in Iowa to prevent the adoption of anti-mail order laws, came to $112,849 (78a).
>
> Loss of Federal's ability to secure business through the national advertising of its services (72a).

Denial of its right to employ pharmacy interns in Iowa (57a).

Limitation of pharmacist employment applications (37a).

Precautionary costs to prevent the filling of prescriptions forged by the Associations and Boards (77a).

Loss of its future prospects for continuing business (76a-77a).

On individual liability Federal's officers argued that their absence from Federal's affairs, their loss of investment in the company, the drop in their credit standings, and an adverse effect on their professional reputations (78a-79a) were types of antitrust injury which should be compensable under 15 USC § 15 and *Zenith*.

On the *quantum* of Federal's injuries it submitted two comparisons between its own results and that of (a) a protected mail pharmacy – the American Association of Retired Persons ("AARP") – and (b) the only other known type of drug discounters, the chain pharmacies (73a), these exhibits being:

(a) Sales costs and profit results realized by Federal, copied from its annual audited records for the years 1963-1978 (Exh. DX-DB).

(b) Comparative industry sales of prescription drugs broken down by number and dollar volume of prescription charges made by the chains and independents during the years 1958-1977 – from annual figures reported by the *American Druggist*, (Exh. PX-190).

(c) The prescription sales and dollar figures for the years 1964-1978 of AARP (Exh. PX-452, 453, Rec. 239) (received *in camera* by affidavit).[1]

[1]From these figures, Federal also submitted eight charts to demonstrate the national increase in discount drug sales as contrasted to Federal results (Exhs. PX 190, 191, 193-198).

These proofs were rejected. The trial court held them to be insufficient to satisfy 15 U.S.C. § 15.

> "[The Court is] wholly unaided by Federal's damage proof. . ." (73a).
>
> "There is no. . .concrete proof of damages. . ." (70a).
>
> ". . .many important obstacles to Federal's growth cannot be attributed to the conspiracy." (75a)

Federal also submitted a computer projection of its unrestrained business as derived by an economic analyst (72a). He calculated that Federal from 1972-1978 has suffered a loss of profit of $1,905,000 and would lose an approximately similar amount in the future (PX 198). This projection was also rejected.

> "This proof [of Dr. Swanson] was unacceptable and unconvincing. . . Plaintiffs' expert was biased. No reliance can be placed on his computations. . ." (72a)

On its own the District Court then estimated Federal's total non-*Noerr* losses of business from APhA's campaign as amounting to $2,800,000 and awarded judgment for its lost profits on a 1% basis, $28,000, to which the Court added $6,000 as compensating for Federal's extra costs incurred over the limitation period in taking precautions against filling forged prescriptions. The two amounted to $34,000, and a trebled judgment of $102,000 was accordingly awarded to Federal (80a).

Future damages were denied on the ground that Federal's audits showed that by 1977 it had become a failing company having no future prospects for increased business (76a-77a).

From this judgment APhA appealed on the merits, arguing that all of its anti-mail order actions were *Noerr* protected. Federal cross-appealed to question the *quantum* of damages allowed. The Court of Appeals reversed the award *in toto* and dismissed the case.

The appellate ruling from which this petition arises affirmed the lower court's holding that the principal source of Federal's damage had been the action of the state Boards and that such action was exempt from antitrust liability under the *Noerr* rule. As to Federal's non-*Noerr* injuries, the Court of Appeals held these to be insufficient to show compensable damages under the hard proof standard of 15 U.S.C. § 15. The trial court's conclusions as to the responsibility of APhA, NABP and the Iowa Pharmacy for Federal's injuries were reversed as being "clearly erroneous" as was the naming of the Iowa Board as a co-conspirator.

The Court of Appeals held that Federal had demonstrated no causal link between the boycott and its injuries and therefore neither the illegal nature of APhA's conduct nor the amount of Federal's damages were relevant to the dismissal of the case (38a).

## ARGUMENT

This case should either be summarily reversed or be heard on a writ of certiorari for the reason that it poses the danger of setting a precedent which would extend the *Noerr* exemption to many cases not now exempted from antitrust challenge. The contradiction between the Court of Appeals decision and the rulings of this Court in *California Transport* and *Zenith* shows that the appellate court has in this opinion so departed from the usual course of judicial proceedings as to require an immediate correction under an exercise of this Court's power of supervision.

## I.

### The Court Of Appeals Decision Misapplies The Criteria Defining The "Sham" Exception To The Noerr-Pennington Rule

It has been many times repeated that the antitrust laws express a "fundamental national economic policy" favoring a system of open competition. A *per se* violation of that policy is to be found in the combination described in the decisions as a "group boycott", a situation which exists where the various powers of those associated in an industry have combined to eliminate or restrict the business of a competitor, *Fashion Originators Guild of America, Inc.* v. *Federal Trade Commission,* 312 U.S. 457 (1941); *Associated Press* v. *U.S.,* 326 U.S. 1 (1945).

The existence of a group boycott is most easily proven in cases where a national professional organization such as APhA has adopted and enforces a Code of Ethics which by its terms prevents organization members from competing in designated ways, *e.g., National Society of Professional Engineers* v. *United States,* 435 U.S. 679 (1968): *Mardirosian* v. *American Institute of Architects,* 474 F.Supp. 628 (D.D.C. 1979), particularly in the case where industry-wide standards would be used, *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.,* 364 U.S. 656 (1961).

As a final note on such hornbook antitrust principles, the cases also hold that anticompetitive objectives such as have been found in this case may be effectuated by the use of otherwise legal means,

> "If the end result is unlawful, it matters not that the mean used in violation may be lawful."
> *California Motor Transport Company* v. *Trucking Unlimited,* 404 U.S. at p. 515 (1972));

*Gordon* v. *New York Stock Exchange,* 422 U.S. 659, 682 (1975); *Northern Securities Co.* v. *United States,* 193 U.S. 197, 347 (1904).

> "The policies of the Sherman Act should not be sacrificed merely because defendants employ governmental processes to accomplish anticompetitive purposes. Otherwise, with governmental activities abounding about us, government could engineer many to antitrust havens."
>
> *Israel* v. *Baxter Laboratories, Inc.*,
> 466 F.2d 272, 277 (C.A.D.C. 1972)

And where a statutory exemption has been allowed, it is only where the law concerned is in clear conflict with the antitrust laws and is necessitated by official policy, *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1972).

1. Applying these rules to this case, the statutory limitations apply even more strongly where state agency regulations are claimed to justify anticompetitive activities.

> "The Court has already decided that state authorization, approval, encouragement or participation in restrictive private conduct confers no antitrust immunity."
>
> (*Cantor* v. *Detroit Edison Co.*,
> 428 U.S. 579 at 592-3, 1976)

The Court of Appeals invoked the state action exemption discussed in *Parker* v. *Brown*, 317 U.S. 341 (1943), to support its exempting of state Board action as official conduct (20a). This was wrong. The limitation on the *Parker* exception was explained in *Cantor* (20a-21a), where it was pointed out that while states *qua* states may sometimes be exempted from antitrust liability for the accomplishment of their governmental purposes, even this exemption is applied only when those purposes are consonant with competitive ends and are free from any necessity for private implementation, *id. City of Lafayette, La.* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978). *Cantor* noted that the persons who invoke the state's exemption to claim justification under a state licensing of conduct which would otherwise be illegal are not to be allowed immunity for

that reason from the normal antitrust consequences, 428 U.S. at 600. Accordingly this reference by the Court of Appeals to *Parker* as exempting the application against Federal of state laws and regulations prohibiting mail pharmacy and drug advertising (36a) was misplaced.

2. Nor could APhA or its state associations claim immunity under state statutes which were openly non-competitive. Such laws are ineffectual to shield the type of activity concerned, *Schwegeman Bros.* v. *Calvert Distillers' Corp.*, 341 U.S. 384 (1951); *United States* v. *Utah Pharmaceutical Ass'n*, 371 U.S. 24 (*summ. aff.* of 201 F.Supp. 29; D. Utah 1962, *app. dism.*, 306 F.2 493); *Health Care Equalization Comm. of the Iowa Chiropractic Soc.* v. *Iowa Medical Soc.* (S.D. Ia. 1980; 80-1 Tr. Cas. ¶ 63,718). It is for this reason that the type of statutes and regulations which have been advanced in this case as being valid expressions of state policy are illegal, and when APhA petitioned to have such statutes adopted its conduct was equally illegal.

3. As noted, APhA's conduct was illegal under *Parker* and equally so in instigating anticompetitive laws. Now we reach an even more important reason for its illegality – the claim that it is entitled to an exemption because it petitioned NABP for such laws. Granted, a group boycott may be antitrust-justified when its otherwise illegal conduct has been found to be a genuine exercise of the right of group petition – a right preserved by the First Amendment, *Eastern Railroad Presidents' Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). In such a case even the existence of an anticompetitive purpose on the part of the boycotters does not alter this conclusion – always assuming that a genuine petitioning is involved.

> "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as a part of a broader scheme itself violative of the Sherman Act."
>
> (*United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

The eliminating of any antitrust significance of an anticompetitive intent under this *Pennington* reading, means that once a colorable explanation of state law petitioning was put forward by APhA, Federal's only effective rebuttal was to show that the claimed exercise of the right of petition was not a "genuine" one in a political sense, but was, under all the surrounding facts, nothing more than a form of sham action whose purpose was to discourage Federal from having "meaningful" access to the Iowa Board and to the federal courts – in other words, an intent or purpose by APhA and NABP to utilize (*i.e.* abuse) the processes of those agencies *as a part of their campaign*. It is this intent to use official means to accomplish the destruction of the mail pharmacy business, which demonstrates that the actions of APhA and its associates were a sham. When that type of intent has been shown, any injury from the instigated action is not exempted from the usual antitrust consequence. This is a central point in this case and calls for a more detailed understanding of the scope of this exemption as defined by this Court.

An early indicator of the nature of the "sham" exception is to be found in the much repeated *caveat* by Mr. Justice Douglas,

> "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Id.* at 144 S.Ct. at 533.
>
> *Eastern Railroad President's Conference* v. *Noerr Motor Freight,* 365 U.S. 127, 144, 1961)

Which we repeat because this reference to the "ostensible" basis of "sham" conduct has never really been changed. It has, however, been given a more detailed explanation by its present definition.

> "First Amendment rights may not be used as the means or the *pretext for achieving 'substantive evils'* . . . which the legislature has the power to control. Certainly the constitutionality of the antitrust laws is not open to debate. A combination of entrepreneurs to harass and deter their competitors from having *'free and unlimited access' to the agencies and courts,* to defeat that right by massive, concerted, and purposeful activities of the group are ways of building up one empire and destroying another."
>
> (*California Motor Transport Company* v. *Trucking Unlimited,* 404 U.S. 508, 515, 1972). (Emphasis added).

A first inquiry in determining whether "free and unlimited access" exists is to evaluate the customary factual elements on which the law depends to indicate that conduct apparently genuine on its face is false in fact., *e.g.,* as listed in *California Transport,* pattern behavior, perjury, bribery, misrepresentation, fraud, or conspiracy with the licensing authority.

*Otter Tail* and *California Transport,* for instance, apply this criterion to a showing of pattern behavior

> ". . . the principle of *Noerr* may also apply to the use of administrative or judicial processes where the purpose to suppress competition is evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims and thus is within the 'mere sham' exception announced in *Noerr."*
>
> *(Otter Tail,* 410 U.S. at p. 380.)

Many other cases show the almost endless variety of situations which can be used to indicate the sham character of petition conduct; *e.g.,* coercive pressures to prevent state officials from authorizing the sale of a competitive product, *Sacramento Coca-Cola Bottling Company* v. *Teamsters Local 150,* 440 F.2d 1096, 1099 (9th Cir. 1971), *cert. denied,* 404 U.S. 826 (1971);

combining with a regulatory agency in a plan to create a monopoly, *Marketing Assisting Plan, Inc.* v. *Associated Milk Producers,* 338 F.Supp 1019, 1023 (S.D.Tex. 1972); filing false nomination forecasts with a state railroad commission, *Wood Exploration & Production Co.* v. *Aluminum Co. of America,* 438 F.2d 1286, 1298 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972). The court of Appeals in footnotes 7-10 of its opinion (18a-19a) has also tabulated many of Federal's appellate citations which give a series of additional decisions showing various examples of sham conduct.

In this case Federal's argument that the *California Transport* rule compelled a "sham" finding was dismissed (18a) on the ground that

> ". . . there is no showing that [APhA] and the National Association [NABP] engaged in any but legitimate politicial attempts to secure governmental action." (18a)

This holding conflicts with the unreversed finding that

> "NABP has assisted APhA directly in the effectuation of its policies against mail order distribution and prescription drug advertising." (56a)

The standard tests of sham conduct, set alongside of the findings of the trial court, are sufficient in themselves to show that APhA's claim to a petitioning exemption from antitrust liability was a sham.

Both Courts below excused APhA from antitrust liability on the ground that state drug advertising prohibitions were valid until 1976, when they were condemned in *Virginia Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U.S. 748, (1976) (5a, 64a). Both Courts overlooked the prior cases. For many years prior to the institution of the Massachusetts litigation – or the revisions made to APhA's Code of Ethics – the law had been clear that state legislation which prohibited the advertising of drugs was illegal.

*United States* v. *Utah Pharmaceutical Association, supra.*

*United States* v. *Arizona Pharmaceutical Association, Inc.*, 51 Ariz. 308, 113 F2d 650 (S.Ct. 1941), 1963 Tr. Cas. ¶ 70,614, (consent decree).

*United States* v. *Idaho State Pharmaceutical Associaton, Inc.*, (D.Id.), 1963 Tr.Cas. ¶ 70,689 (consent decree).

These cases adopted the rule of *Schwegeman Bros.* v. *Calvert Distillers' Corp., supra,* to the effect that states cannot by adopting such legislation immunize private individuals from the consequences of the antitrust laws. Moreover these federal decisions and decrees coincide in law with state decisions which have equally held such statutes to be illegal. *Stadnik* v. *Shell's City, Inc.*, 140 So.2d 871 (Fla. 1962); *Maryland Board of Pharmacy* v. *Sav-A-Lot Drugs, Inc.*, 270 Md. 103, 311 A.2d 242 (1973); *Pennsylvania State Board of Pharmacy* v. *Pastor,* 441 Pa. 186, 272 A.2d 487 (1971).

The cases that deal with the illegality of drug advertising prohibitions follow the established doctrine that any law which prohibits the price advertising of a commodity constitutes an illegal restraint on commerce, *United States* v. *American Association of Advertising Agencies, Inc.* (consent decre (D.N.Y., 1956 Tr. Cas. ¶ 68,252), *National Society of Professional Engineers* v. *United States,* 435 U.S. 679 (1978); *United States* v. *National Funeral Directors Association* (consent decree) (D.Wisc. 1968, Tr. Cas. ¶ 72,529); *Gough* v. *Rossmor Corp.*, 487 F.2d 373 (9th Circ. 1973).

In other words, any claim that APhA lacked knowledge before 1976 of the invalidity of laws and regulations prohibiting the price advertising of prescription drugs appears to be a deliberate misrepresentation on its part, and if so, APhA's action in urging states to adopt such laws, its instigation of the Massachusetts Association case against Federal in 1967, and the adoption of prohibitions against advertising in its Code of

Ethics, were each based on the type of misrepresentation which indicates sham conduct.

A second example of possible misrepresentation lies in the assumption noted by the Court of Appeals (6a) that until the *Goldfarb* decision[2] in 1975, and the *Virginia Pharmacy Association* case in 1976, APhA had no awareness that pharmacists were not also exempt from the antitrust laws as a learned profession (6a). The appellate Court accepted the argument that this claim of APhA was lawfully maintained under the rules given in *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, (1935), and *United States* v. *Oregon Medical Society*, 343 U.S. 326, 336, (1952). This same defense of professional exemption had been asserted by a component of APhA twenty years ago in 1962 in the *Utah Pharmaceutical Association* case, *supra*. The claim was not only overruled at that time but, as previously noted, that decision was affirmed in this Court and established the law that pharmacy was not a profession exempt from the antitrust laws.

A third ground for a finding of sham conduct here is the self-interest of the state Boards. The trial court found that the members of such Boards – who voted for national pharmacy standards in their capacity as NABP members – were mostly community pharmacists (20a). Their economic self-interest was thus directly opposed to that of Federal particularly in considering the finding of the trial court that the objective of APhA's campaign was to protect such community druggists from the competition of mail pharmacy (56a). It has been held that the self-interest of an agency invalidates its action, *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, (1962).

4. Another aspect of sham conduct related to self-interest is participation by the agency in the conspiracy. *California Transport* indicates this may be used in determining whether petition action is sham

> "Conspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression." (404) U.S. at 513.)

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[2]*Goldfarb* v. *Virginia State Bar*, 421 U.S. 733 (1975).

The same rule is stated in *Continental Ore* where the respondent had conspired with the licensing authority in order to eliminate a competitor. This was held to be unlawful under the principle which had been expressed earlier in *Anderson* v. *Shipowners Ass'n*, 272 U.S. 359, and *Associated Press* v. *United States*, 326 US 1 (1945). The latter case condemned the adoption of restrictive by-laws by which the publishers in the combination had surrendered themselves to the judgment of a news association (p. 613) – very much as the state pharmacist Associations – particularly the "affiliated" ones – have surrendered themselves to APhA's judgment as expressed in its Code of Ethics.

5. Even if APhA's petition conduct is not of necessity shown to be sham under these more familiar criteria, it was certainly so under the reading of the *Noerr* rule by the First Circuit in the *Whitten* decision – a commercial interpretation of the "abuse of process" test given by *California Transport*. The *Whitten* conclusion as to sham petitioning was inferred from the "non-political" character of the petitioning involved, *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25, 33 (1st Cir. 1970), *cert. denied*, 400 U.S. 850 (1970). There the First Circuit put forward what has come to be known as the "commercial activity" test of the sham character of a petition, namely, to see whether the result petitioned is consonant with existing state policy or deviates to serve a commercial objective.[3]

In *Whitten* a conflict existed between the state competitive bidding laws and the object of the petition, to block a competitor by the adoption of limited standards, This view was also used by the Court of Appeals in the District of Columbia in *Hecht* v. *Pro Football, Inc.*, 444 F.2d 931, 940-42 (1971), *cert denied*, 404 U.S. 1047, where a similar conflict of policy existed between the Redskins' demand for the exclusive use of the City's stadium, and the policy of open access to City facilities. The petition of the Redskins was seen as non-political in purpose

[3]Discussed in "The Sherman Act and 'Government Action' Immunity Reconsidered," 71 Col. L.R. 140.

and was interpreted therefore as a sham form of petitioning conduct which would not be exempted from antitrust liability.

The *Whitten* criterion was also adopted in *Sacramento Coca-Cola Bottling Company* v. *Teamsters Local 150, supra,* and was both accepted and then rejected in the conflicting opinions of Judges Renfrew and Schwarzer writing on the same point in the multi-district litigation reported as *In Re Airport Car Rental Antitrust Litigation,* 474 F.Supp. 1072, (N.D. Cal. 1979), (second opinion not reported), a case dealing with the charged monopolization of leased car rental space in contracts with concededly unbiased airport authorities.

When looked at analytically *Whitten* is essentially a further delineation of the "purpose" language used in *California Transport* – where a non-exempt secondary intent to accomplish an anticompetitive objective by using the agencies or courts is condemned as evidencing a purpose to discourage, *i.e.,* block, free resort to the relevant agencies and courts.

> "The nature of the views pressed does not, of course, determine whether First Amendment rights may be invoked; but they may bear upon a purpose to deprive the competitor of *meaningful* access to the agencies and courts. As stated in the opinion concurring in the judgment, such a purpose or intent, if shown, would be 'to discourage and ultimately to prevent the respondents from invoking' the processes of the administrative agencies and courts and thus fall within the exception to *Noerr.*"
>
> (*California Motor Transport Company* v. *Trucking Unlimited, supra,* 404 U.S. at p. 512; emphasis added).

Both Courts below stopped short of this point. They discussed and dismissed Federal's contention that APhA's petitioning of state Board assistance through NABP was a sham petition since its purpose was to encourage the state Boards to adopt improper legislation and regulations which would only serve to advance the APhA/NABP objectives. Thus, although

the "meaningful access" language of *California Transport* was repeated by both Courts (14a, 67a), it was not fully applied, apparently holding that because Federal still had "access" to the Iowa Board, its recourse to that agency was "meaningful". This was a fundamental error of fact and law as the *Whitten* test of "commercial activity" helps to demonstrate.

Such "access" to a hostile and biased pharmacy Board (*ante*, p. 7), was a contradiction of the "discouragement" rule of sham conduct stated in *California Transport*. It would be difficult to imagine a more discouraging form of "access" than Federal's technical right to call on the assistance of the Iowa Board to act against APhA.

6. The same contradiction exists between the ruling below and this Court's definition of the scope of the *Noerr* exemption with respect to the *Massachusetts Association* suit, and the responsibility of APhA for the conduct of the Iowa Board of Board of Pharmacy Examiners.

The ten-year *Massachusetts* suit against Federal (1967-1977, 62a, 63a) was

> ". . . instituted primarily for the purpose of eliminating Federal's price competition with the Massachusetts Association members." (63a)

As such it was "baseless" as a matter of law and therefore did constitute a deliberate abuse of the process of the several courts involved. More importantly, while it continued it threatened the existence of Federal's business and, under the rules of comity, prevented Federal from bringing a counter-suit, *Kline* v. *Burke Const. Co.*, 260 U.S. 226, 230 (1922); *Preston Corp.* v. *Raese*, 236 F.Supp. 135, 144, *affd.* 377 F.2d 263, *cert. den.* 389 U.S. 931.

The Massachusetts Association suit not only adopted the proposals of APhA's legal memorandum (62a) but the action was legally and financially supported in Iowa by both APhA and NABP after Federal's default had been taken in Massachusetts

(62a, 63a). Nonetheless, the trial Court's conclusion as affirmed on appeal was

> "The Massachusetts-Iowa litigation is clearly entitled to *Noerr* protection . . . There can be no showing that the claim was baseless or frivolous . . ." (24a, 67a)

Federal says it was both. The Massachusetts suit was brought by a co-conspirator, was found to be deliberately anticompetitive in intent, was instigated by APhA in furtherance of the conspiracy, was supported with funds supplied by the conspirators and was effective in preventing Federal from invoking judicial alternatives. On these findings it was a misuse of the judicial process and denied Federal the unrestricted resort to the courts which *California Transport* mandated.

7. The trial Court finding that the Iowa Board was a co-conspirator was reversed on appeal as "clearly erroneous." This was error.

The campaign which that Board had continuously waged against Federal has already been described (*ante*, p. 7). But the ultimate question is not necessarily the guilt of the Iowa Board. The respondent is APhA. The Iowa Board was not itself named as a defendant. On the other hand it continued as a member of NABP after the anti-mail pharmacy and drug advertising resolutions had been adopted and is therefore chargeable with participating in the economic purposes of APhA's campaign and sharing in NABP's conspiratorial activities.

But such an inference is not required. Taking a direct finding as the basis of reversal, the District Court held that the Iowa Board had directly participated with the Iowa and Nebraska Associations in preparing forged prescriptions to be sent to Federal and with the knowledge of the falsity of the evidence on which it was acting used its processes to cancel Federal's pharmacy license (58a; and see *ante*, p. 7, underlined portion of quotation). This was a clear abuse of agency process. Both the Iowa and Nebraska Associations were not only found to be co-

conspirators but they were constituent parts of APhA. A direct connection has therefore been shown between the Iowa Board and APhA in the furthering of the latter's purpose to destroy Federal.

This instance of active collaboration does not appear in the opinion of the Court of Appeals (26a, 27a) nor was it reversed. The Iowa Board's action was described in the Appeals opinion as being merely "parallel" type conduct (27a). This was an overt error of fact and calls for reversal. If for no other reason, the conclusion that APhA's petitioning of the Iowa Board was *Noerr* exempt is patently wrong.

8. A final point as to the Noerr type exclusions in the Court of Appeals opinion concerns its affirmance of the dismissal of NARD as a defendant, (16a) (471 F.Supp. 126 (1979); 84a *et seq.*). As indicated *ante* at p. 7-8 NARD and APhA had jointly convinced the American Medical Association to adopt resolutions calling on doctors to warn patients not to use mail pharmacy services. This was held to be *Noerr* exempt as

> "[an] indirect attempt[s] to influence governmental behavior." (89a)

Since no legislation of any kind was pending and the resolutions were directed to influencing patients, not to assist in petitioning for the passage of any laws, it is difficult if not impossible to identify what "governmental behavior" was in question.

If *Noerr* exempts any such combination and whether or not any petitioning conduct is there involved, then it has a scope as broad as the antitrust laws themselves. Virtually every infraction of such laws could then be claimed to be – with truth – an indirect attempt to influence some kind of government action. The dismissal of NARD should be reversed as a direct conflict with existing antitrust principles.

## II

### Federal Has Sufficiently Proven That Its Non-Noerr Losses Were the Result Of APhA's Anti-Mail Order Campaign

Under 15 U.S.C. § 15 (§ 4 of the Clayton Act) an antitrust plaintiff must prove that an injury to his business or property was caused by an antitrust illegality. His burden on the latter is called proving the fact of damage and admittedly the evidence required is greater than that used to show the amount of the injury, *Story Parchment Co.* v. *Paterson Paper Parchment Co.*, 28 U.S. 555 (1931).

As more recently detailed, the evidence required to show this fact of damage has been described in *Zenith Radio Corp.* v. *Hazeltine Research Inc., et al.*, 395 U.S. 100 (1969) as follows:

> "Zenith's burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; . . . it is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4."

It is Federal's position that it did make proof of *some* damage in this case and the appellate court's reversal of the trial court findings as clearly erroneous (38a) was an error which directly conflicts with the quoted *Zenith* rule.

Federal put in evidence eight items of campaign-caused injury *(ante* p. 8-9), some of which the trial court had held to be incompensable as *Noerr*-related (66a, 79a).[4] As to the balance, the Court of Appeals identified four remaining claims and added Federal's loss of business to its list as an aspect of the group boycott finding

> "(1) a 'group boycott' among [APhA] and its co-conspirators, 'specifically directed at Federal' with 'the intended and necessary effect of excluding or im-

[4]Target area as well as individual losses are included, *Drysdale* v. *Florida Team Tennis*, 410 F.Supp 843 (W.D. Pa. 1976).

> peding Federal and other mail order pharmacies from access to retail customers'; (2) [APhA's] prohibitions on advertising, (3) the concerted opposition to discounting, and (4) the restrictive applications of the Code of Ethics affecting non-members."(29a)

As to the first the Court of Appeals ruled that the trial court finding that Federal's loss of business was caused in part by APhA's campaign lacked probative evidence, but was merely an effect which

> "was an attempt to galvanize the *health community* into a unified *political* opposition . . ." (34a; emphasis added)

Although the Court of Appeals necessarily accepted the fact that Federal had lost business – having noted the declining of sales by half a million dollars annually –

> ". . . the company did either lose money or make only a marginal profit in each year" (37a)

but saw this as a business problem.

> ". . . the existence of antitrust violations was not the only available explanation for this lack of business success." (37a)

The appeals court held that the evidence of Federal's extra forgery inspection costs was "too speculative" and in any event was "naturally to be expeted" in a mail order pharmacy (32a-33a). APhA's letters asking magazines to reject mail pharmacy advertising, having its membership write articles for local medical journals to decry the use of mail service, and opposing mail order pharmacy and drug price advertising through "pharmacy, student, and health groups" (34a) were all viewed as being "too remote" from Federal to satisfy the "reasonably certain" test of injury under the antitrust laws (34a).

To the extent that Federal suffered losses from its inability to openly advertise drug prices it was held that APhA's general publicity campaign should have been viewed as governmental action (35a), and under that view the action was exempted by the *Noerr* rule (36a).

Reviewing the prohibition adopted by APhA in its Code of Ethics, the Court of Appeals held that the advertising prohibition was not relevant to the result since, even in those states which did adopt the Code as state law,

> ". . . Federal may well have been adversely affected, but since the source of the affect was state action Federal has no recourse under the antitrust laws." (36a)

As to the other states, the prohibition was seen as benefitting Federal (36a).

On the Code prohibition against employment in mail order pharmacies it was held that Federal had not sufficiently shown that it had difficulty in hiring and in any event only one-third of the nation's pharmacists were members of APhA. This led to the conclusion that

> "Federal's evidence is once again too scant to support a finding of injury in fact." (37a)

Finally, dismissal of the individual damage claims was affirmed as involving losses "unrelated to business considerations" and were in any event compensated for by Federal "for the time . . . expended in combatting [APhA's] conspiracy" (38a).

*Zenith* is a close parallel to the present action. There an award in the District Court was also reversed on appeal, it being held that the essential findings on the fact of damage were "clearly erroneous" (338 F.2d 25, 7 Cir. 1968). This Court reversed and remanded, pointing out

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence."

Some items of Federal's proof are admittedly drawn from reasonable inference. But such a method of showing the fact of damage is permissible:

> "The Court has repeatedly held that in the absence of more precise proof, the factfinder may conclude as a matter of just and reasonable inference . . . that defendants' wrongful acts had caused damage to the plaintiffs."
>
> *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. at 123-124

Similarly, an antitrust plaintiff need not prove that the conspiracy was the exclusive cause of the injury. *Zenith* in the quoted section limits the proof required to a "material" or "substantial" cause.

> "The plaintiff is not obligated to show there were no other contributing factors to the injury. All plaintiff must establish is that the defendant's violation was a "material' or 'substantial' contributing factor." *Momand* v. *Universal Film Exchanges*, 172 F.2d 37 (1st Cir. 1948), *cert. den.* 336 U.S. 967).

The trial court found that Federal had lost at least $2,800,000 in business from APhA's campaign even in non-*Noerr* areas (77a) and had extra anti-forgery expenses of $6,000 (78a). Federal's employment difficulties, both as to interns and APhA members, were a definite source of "some" damage, as was the legal cost of recapturing its pharmacy license from the Iowa Board. How much it lost from the prohibition on advertising in the Code of Ethics, the cease and desist orders, or from doctors telling their patients not to use Federal, represents an obvious loss of business even if the amount remains open to question.

Federal submits that under the rule laid down by the first *Zenith* it has sufficiently shown by direct proof and valid inference the evidence required of it to satisfy the fact of damage aspect of 15 U.S.C. § 15 and the ruling of the Court of Appeals was in error in denying that fact.

## III

### It Was Error To Hold That Federal Had No Right to Future Damages Because of Its Decreased Business

The finding challenged here is as follows:

> "No basis exists for finding any loss of future profits. Mail order prescription sales have flattened out. There is no proof that Federal's business will be more than marginally profitable in the future." (77a)

In the ordinary event the right to future damages is well established, *Lawlor* v. *Loewe,* 235 U.S. 522 (1915). As this Court said in the second *Zenith,* (401 U.S. 321, 339),

> "In antitrust and treble damage actions, refusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered."

*Id. Lessig* v. *Tidewater Oil Co.,* 327 F.2d 454, (9 Cir. 1964); *A.C. Becker Co.* v. *Gemex Corp.,* 272 F.2d 1, (7 Cir. 1959).

Nor are future damages to be classified as "speculative" since they measure the going concern value of a plaintiffs' business.

The quoted finding represents Federal as being a declining business, which it is. The more pertinent question is whether that decline can be fairly attributed to the APhA/NABP campaign, with the consequent loss of the financial reserves required to recover its former status and again advertise its availability.

As Federal sees it the trial Court's conclusion of the lack of future business contradicts another finding, that

> ". . . [Federal] never operated free of illegal restraints, . . ." (75a)

Therefore, even were Federal now forced to sell its business at a depressed price, its future damages would not be "speculative", *Albrecht* v. *Herald Co.,* 452 F.2d 124 (8 Cir. 1971), *mand. den.* 405 U.S. 1063; *Wood* v. *Gulf Oil Corp.,* 498

F.2d 1240 (5 Cir. 1974); *Pollock and Riley, Inc.* v. *Pearl Brewing Co.*, 498 F.2d 1240 (6 Cir. 1974); *cert. den.* 420 U.S. 992.

Or as the rule was summed up by the Fifth Circuit in *Lehrman* v. *Gulf Oil Corp.*, 500 F.2d 659 (5 Cir. 1974), *cert. den.* 409 U.S. 1077,

> "The assertion [no prospect of future business] is actually a variation on the theme that a firm that had failed to prosper under the weight of an antitrust violation is entitled to no damages because there was no substantial profit record."

The rejection of Federal's claim for future damages was clearly error as a matter of law.

## IV

### The Individual Petitioners Brought Themselves Within The Rule of Zenith and Should Have Been Granted Relief

The *Zenith* rule of damages has been given above, p. 25. In essence it requires that *some* evidence of injury be shown by direct fact or by reasonable inference. Such evidence was given, admittedly by self-interested testimony. It was not contradicted.

The individual petitioners are the three owner/officers of Federal. Since 1963 their investment in Federal has decreased in proportion to its loss of business, their credit standings and professional reputations have been reduced. Federal's chief pharmacist has been twice arrested and once jailed on the filling of Board-forged prescriptions.

Neither Court below saw such injuries as being more than scant and social (38a, 80a). They were viewed as "injuries to private affairs, unrelated to business considerations" (38a). It is of course true that the only source of proof was the *"ipse dixit"* (33a) testimony of the three. But, it is hardly the type of subject that lends itself to the use of documents.

In the absence of any countervailing evidence, they have shown some compensable injury which they suffered for fifteen years as a result of APhA's campaign.

## CONCLUSION

APhA and NABP have been shown to have engaged in a group boycott of the business of mail service pharmacy, including Federal. Federal has been shown to have suffered damage. The Court of Appeals sustained APhA's claims of exemption (1) as being compelled to so act under valid state statutes and regulations and (2) as exempted from liability by the *Noerr* rule. Federal's other damages have been held to be negligible or unproven.

That ruling should be reversed. If the opinion remains as it is, it will extend the *Noerr* exemption well beyond the limits announced by this Court in *California Transport* and will reward successful unification by professional groups. It will also increase beyond practical limits the level of proof of damage required under the first *Zenith* decision. Its use as a precedent would contradict the policies and effective administration of the antitrust laws in the future. This poses a danger of such proportion that this Court should immediately exercise its powers of supervision to preserve present law.

Respectfully submitted,

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## APPENDIX A

**United States Court of Appeals**
For the District of Columbia Circuit

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No. 80-1359

FEDERAL PRESCRIPTION SERVICE, INC., ET AL.

v.

AMERICAN PHARMACEUTICAL ASSOCIATION, APPELLANT
WILLIAM S. APPLE, ET AL.

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No. 80-1368

FEDERAL PRESCRIPTION SERVICE, INC., ET AL.,
APPELLANTS

v.

AMERIAN PHARMACEUTICAL ASSOCIATION, ET AL.

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**Appeals from the United States District Court for the District of Columbia (D.C. Civil Action No. 77-1163)**

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Argued April 27, 1981
Decided August 12, 1981

*Michael H. McConihe* with whom *Paul L. O'Brien, Arthur D. McKey, Joel E. Hoffman* and *C. Coleman Bird* were on the brief for American Pharmaceutical Association appellant in No. 80-1359 and cross/appellee in No. 80-1368.

*George S. Leonard* for Federal Prescription Service, Inc., et al., appellees in No. 80-1368 and cross/appellants in No. 80-1359.

*Richard M. Rindler* and *Gilbert E. Geldon* entered appearances for appellees, National Association of Retail Druggists in No. 80-1368.

Before: MacKinnon and Edwards, *Circuit Judges* and Davies*, *United States Senior District Judge* for the District of Fargo North Dakota

Opinion for the Court filed by *Circuit Judge MacKinnon.*

MacKinnon, *Circuit Judge:* Federal Prescription Service, Inc. ("Federal") and its three owners brought an antitrust damage suit against the American Pharmaceutical Association, Inc. ("American") and certain other defendants. The other defendants have since been either dismissed or dropped as defendants and then named as coconspirators. The district court found that American, the sole remaining defendant, had committed several violations of section one of the Sherman Act, 15 U.S.C. § 1, including participation in an unlawful conspiracy with the Iowa Board of Pharmacy Examiners to harm Federal through a series of governmental actions aimed at Federal's mail order pharmacy practice in Iowa. The court found that these and other unlawful actions damaged Federal to the extent of $28,000 in past lost profits and $6,000 in costs to check for forgeries attributable to American's conspiracy against mail order pharmacy. The district court declined, however, to award any damages for future loss of profits or for losses incurred by the individual owners of Federal. American appeals from the

*Sitting by designation pursuant to 28 U.S.C. § 294(d).

ruling of liability, Federal appeals from the dismissal of a co-defendant and from the limitations on damages. We reverse the award of damages, holding that the facts of this case reflect no actionable conspiracy under the anti-trust laws. We thus do not reach the question whether the amount of damages was properly computed.

## I. Background

The district court's opinion, 484 F. Supp. 1195 (D.D.C. 1980), details the facts and we recite only those that are relevant to the disposition on appeal. The plaintiff, Federal, was organized in 1963 and operates out of the small town of Madrid, Iowa. It is licensed to dispense prescription drugs by the Iowa Board of Pharmacy Examiners, an agency of the State of Iowa.[1] Federal specializes in mail order pharmacy: it solicits the business of persons throughout the United States, who mail their prescriptions to Federal and receive their drugs by return mail.

The American Pharmaceutical Association is the national professional society of pharmacists in the United States. Its 60,000 members include practicing pharmacists, scientists, educators, and government-employed pharmacists. The court found that about one-third of all practicing pharmacists in the United States are members of American.

The district court found that to maintain a sufficient volume of prescriptions a mail order pharmacy must

[1]Federal and state laws provide that certain drugs may be dispensed only upon presentation of a prescription. Valid prescriptions are issued primarily by physicians and also by veterinarians and dentists. Prescriptions are filled by licensed pharmacists.

advertise discounted prices on at least some of its items. These prices naturally tend to divert customers from the more traditional local pharmacies, which fill prescriptions for a walk-in local clientele. The reliance of mail order pharmacy on advertising and its competitive threat to the more traditional pharmacies was well known to the sole defendant in this case.

A. *American's Anti-Mail Order Pharmacy Campaign*

Since 1960 American has campaigned against the distribution of prescription drugs by mail. The district court found that

> [a]lthough this opposition was usually couched in terms of a concern that mail order pharmacies undermined the pharmacist-patient-physician relationship and thus threatened patient safety or public health, in fact [American] throughout was motivated primarily by its concerns for the economic well-being of its members. The validity of the health concerns, repeatedly expressed, was never satisfactorily supported at trial.

484 F. Supp. at 1200. In general terms, American sought to persuade governmental agencies, other trade groups, and national magazines that mail order dispensing of prescription drugs is harmful to the public health. This message was presented in correspondence, at meetings, in speeches, and in American's *Journal* and newsletter, which were distributed to its members and to others in the pharmacy profession.

One early success came in 1960, when American, acting jointly with the National Association of Retail Druggists, persuaded the American Medical Association to adopt a resolution calling upon physicians to discourage use of

mail order prescription services, except in rural areas. American's message was also partially responsible, the district court found, for the passage of 16 state laws forbidding mail order practice, and 30-35 state laws or regulations that hampered mail order pharmacy by prohibiting the advertising of prescription drugs.[2] In addition, in 1962, American reported that 16 state boards of pharmacy had responded to its message by issuing cease-and-desist orders against mail order houses.

Playing an important role in American's anti-mail order pharmacy campaign was its Code of Ethics. Either expressly or by the interpretation of American's Judicial Board the Code aimed to limit participation in mail order

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[2]These laws were urged by American and enacted by state governments against the background of Supreme Court precedent that authorized the placement of broad anticompetitive restraints on the learned professions. *See, e.g., Head v. New Mexico Bd.*, 374 U.S. 424, 432 n.12 (1963) (rejecting constitutional challenge to state prohibition on eyeglass frame price advertising by optometrists); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489-90 (1955) (also rejecting challenge to prohibition on eyeglass advertising by price) ("We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers."); *Semler v. Dental Examiners*, 294 U.S. 608, 612 (1935) (rejecting constitutional challenge to prohibition on price advertising by dentists) ("We do not doubt the power of the State to . . . put a stop to . . . practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous.")

It was not until 1976, when the Supreme Court conferred on commercial advertising the protection of the First Amendment, that the presumptive unconstitutionality of advertising bans became apparent. *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 762 (1976) (statute declaring it unprofessional conduct for a licensed pharmacist to advertise prices for prescription drugs is unconstitutional).

pharmacy by establishing two prohibitions: no member pharmacist could participate in any service eliminating the pharmacist-patient-prescriber relationship; and no member pharmacist could "solicit professional practice by means of advertising." The effect of these prohibitions was strengthened by a further prohibition that no member pharmacist could continue his employment in a pharmacy that did not comply with the other requirements of the Code. *Id.* 1201.[3] In 1975, faced with a Justice Department antitrust suit, American dropped its advertising ban in favor of a new provision stating that pharmacists "should strive to provide information to patients regarding professional services truthfully, accurately, and fully and should avoid misleading patients regarding the nature, cost, or value of the pharmacist's professional services." *Id.* The court found that the other bans, however, remained in effect.

Also instrumental in American's anti-mail order pharmacy campaign was its chief executive officer, William S. Apple. The district court found that Apple was a co-conspirator of American, on the basis that he had

> traveled throughout the country to make speeches on behalf of [American] and wrote numerous articles in which he constantly attacked mail order pharmacies and emphasized the need to uphold the Code of Ethics and rulings of the Judicial Board. Mail order prescription was

[3] It was not until 1975 that the Supreme Court decided "the practice of a learned profession falls within § 1 of the Sherman Act." *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 786 n.15 (1975) (minimum-fee schedule published by county bar association and enforced by state bar violates Sherman Act§ 1).

> pictured as a "scheme" that threatened to destroy community pharmacy service. Pharmacists were told they were fighting for economic survival and the opportunity to earn a living. Price-cutting was said to be a gimmick for conning the public. Advertising was described as professionally improper. Pharmacists were urged to alert physicians and regulatory officials as well as other pharmacists to the danger perceived. In this fashion, with the aid of [American's] publications, Apple largely succeeded in uniting the profession to a concerted opposition to mail order pharmacies.

*Id.* at 1204.

The district court found that Apple and American had enlisted several other organizations in a conspiracy to inhibit mail order competition for the benefit of American's pharmacist members. Among those labelled as co-conspirators was the National Association of Boards of Pharmacy. The membership of this group – a private organization – includes the members of the licensing boards which in each state regulate pharmaceutical practice. The National Association participated in the conspiracy, the court found, by adopting American resolutions that opposed mail order drug distribution and drug advertising and by sending copies of these to all of its members. The National Association also cooperated in setting up the 1960 conference "to determine what steps should be taken to oppose mail order drug distribution." *Id.* at 1203. At that meeting "all state boards [of pharmacy] were asked to use every legal method to oppose the establishment of mail orders houses." *Id.*

The court found that the American College of Apothecaries was also a co-conspirator. Made up of phar-

macy owners, this group was a national organization affiliated with American that "joined with American in opposing the distribution of prescription drugs by mail." 484 F. Supp. at 1203.

Also found to be a co-conspirator was each state pharmaceutical association that had been recognized by American. Each of these associations has the right to select two voting delegates to American's House of Delegates, its policy-making body. The chief administrative officers of all state pharmaceutical associations form the National Conference of State Pharmaceutical Association Executives. In its annual conference in 1960, this group and American co-sponsored a conference that resolved to oppose mail order pharmacies. In addition, 17 state associations had entered into reciprocal membership agreements with American whereby applicants for state association membership had to abide by American's Code of Ethics.

One of these state organizations affiliated with American was the Iowa Pharmaceutical Association. One thousand of its 1600 members were also members of American,[4] and, like several of the other state organizations, it adopted American's Code of Ethics as its own. It circulated opinions of American's Judicial Board to all of its members and submitted questions to the Board for further interpretations of the Code of Ethics. It established a Grievance Committee to enforce compliance with the Code and called on the Missouri Board of Pharmacy to take action against a Missouri mail order concern that was filling prescriptions from Iowa residents. Finally, in

[4]Under a "grandfather" clause, those who joined the state association prior to its affiliation with American were not required to join the national organization.

1964 or 1965 the Association advised a Nebraska pharmacist who had complained of Federal's mail order practice that he should arrange to have bogus and forged prescriptions sent to Federal to see if they would be filled. When they were, the Association relayed the information to the Iowa Board of Pharmacy Examiners with a request that it take enforcement action against Federal, which it did.

The Iowa Board may be the most important of the co-conspirators found in this case. Like pharmacy boards generally, the Iowa Board is a governmental body empowered to license and regulate the practice of pharmacy. The court noted that during the time relevant to this suit the Iowa Pharmaceutical Association had the power to compile the list of persons from which the Governor would select members of the Board, and those persons were in each case members of the Iowa Association.

The Board, the court found, undertook a series of actions against Federal, several of them unlawful. The Board first denied Federal's license application, granting it only after being told by the Iowa Attorney General that state law did not prevent issuance of a pharmacy license to a mail order house. Then, in 1964, the Board delayed the grant of Federal's change of address license. The Board also imposed burdensome inspection conditions on Federal, and cooperated with pharmaceutical associations in Iowa and Nebraska in preparing forged prescriptions to be sent to Federal. In 1965, on the basis of these filled prescriptions, the Board revoked Federal's pharmacy license, but Federal succeeded in Iowa state court in having the revocation annulled. In 1968 the Board attempted to seize Federal's inventory pursuant to a search warrant, but withdrew the warrant after Federal filed suit to prevent the search and before any seizure was effected. In

1970 the Board withheld Federal's annual relicensing. In 1973 the Board induced the state to seek to have Federal enjoined from filling out-of-state prescriptions, but the action was dismissed and the Iowa Supreme Court affirmed the dismissal. Finally, in 1966, the Board denied Federal's request to be certified as a suitable employer of pharmacist interns. The reason for the denial, the court found, was that Federal did not belong to the Iowa Pharmaceutical Association.[5]

Federal also encountered legal difficulties in Massachusetts. In 1967 the Massachusetts Pharmaceutical Association secured a state court judgment that Federal's mail order activities in Massachusetts constituted the unlicensed practice of pharmacy in the state. Federal did not appear in the Massachusetts proceedings to present its defense. The Massachusetts Association then asked that American finance a suit to enforce the Massachusetts judgment in Iowa under the Full Faith and Credit Clause. American agreed, and paid for two actions, one federal and one state, neither of which resulted in an enforcement of the Massachusetts judgment. The National Association of Boards of Pharmacy approved of this action, noting in its minutes that its staff was to support the Iowa suits, even though, the court found, the National Association

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[5]In explaining why Federal did not qualify to be a preceptor of pharmacist interns, the Iowa Board did not mention membership in any asociation. There was evidence, however, that a pharmacy that scored below 85 on the state's annual Inspection and Rating Report could not be a preceptor, that the Report's forms deducted 10-15 points if the pharmacy belonged to neither the Iowa Association nor the American Pharmaceutical Association, and that Federal's scores were within 10 of the required 85. Tr. 86; Plaintiff's Exhibits 48-50. It thus appears that Federal's nonmembership was a dispositive reason for its rejection as a preceptor. We understand that to be the basis of the district court's finding.

"knew at the time that the Massachusetts suit . . . had been instituted primarily for the purpose of eliminating Federal's price competition with the Massachusetts Association members." 484 F. Supp. at 1206.

B. *Decision of the District Court*

The district court concluded that there had been a "group boycott" among American, Apple, the National Association of Boards of Pharmacy, the American College of Apothecaries, each state pharmaceutical association, and the Iowa Board of Pharmacy Examiners. The court found that the boycott was designed to impede the access of Federal and other mail order pharmacies to prescription drug customers, and amounted to a per se violation of section 1 of the Sherman Act. The court cited as elements of this unlawful group boycott the pre-1975 ban on advertising, the opposition to discount, and the applications of the Code of Ethics that affected nonmembers as well as members of American.

Some of the activities of American and its coconspirators, however, were found to be beyond the coverage of the Sherman Act as interpreted by the Supreme Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). The *Noerr* doctrine, holding immune from antitrust liability those activities genuinely intended to influence governmental policy, was held to protect the conspirators' participation in the Massachusetts-Iowa litigation and, for the most part, their lobbying of state boards. The court also dismissed as a defendant the National Association of Retail Druggists, on the ground that its actions in concert with American were simply "joint attempts to enlist other organizations with allied interests to rally in a common publicity effort" and, as such, protected, by *Noerr*.

*Federal Prescription Service v. American Pharmaceutical Ass'n*, 471 F. Supp. 126, 130 (D.D.C. 1979).

The series of actions taken against Federal by the Iowa Board, on the other hand, convinced the district court that the Board's administrative processes were being abused by a conspiracy among American, the Iowa and Nebraska state pharmaceutical associations, and the Board members themselves. For the Board's actions, then, American was held liable.

> The court then turned to an assessment of damages. "Viewing the conduct of [American] and its co-conspirators as a whole after eliminating *Noerr*-protected conduct," the court thought it "clear that Federal's sales were inhibited and its profits accordingly affected," 484 F.Supp. at 1209, although the statute of limitations prevented recovery for damages suffered prior to November 1971. The court attributed some of Federal's lost sales and profits to "the opposition of [American] and its co-conspirators to mail order advertising and the enforcement of [American's] Code of Ethics." *Id.* at 1210. Specifically, the court inferred that American's general campaign had some indirect effect on national magazines that rejected advertising proposals submitted by Federal. *Id.* In addition, the conspiracy was to be "held partially responsible" for the restraint that Federal felt it had to exercise in advertising discount prices. The activities of the conspiracy "undoubtedly had a negative effect on Federal's sales" because American, in collaboration with its co-conspirators, had made its "opposition to advertising, discounting, and

> mail order. . . well known." *Id.* At the same time, the court recognized that Federal sales were also impaired by legislation and litigation, neither of them actionable in this case given the immunity within *Noerr,* and by other factors, such as labor difficulties, that could not be attributed to the conspiracy.

Having found that actionable elements of the conspiracy had had some adverse effect on Federal's sales and profits, the court then determined, through a reasoning process not relevant to our disposition of this appeal, that the amount of Federal's actionable damages amounted to $28,000 in lost profits. 484 F. Supp. 1210-3. The court also determined that the forged prescription scheme resulting in the revocation of Federal's pharmacy license by the Iowa Board had required Federal "to incur extra, precautionary expense to avoid filling forged prescriptions attributable to the conspiracy" in the amount of $6000. *Id.* at 1213. Requests for further awards of damages were denied, leaving Federal with a trebled damage award of $102,000.

## II. Discussion

### A. *Issues of Liability in Light of the Noerr Doctrine*

Many of the issues on appeal involve the district court's applications of the *Noerr* doctrine. The district court held several of the joint anticompetitive activities attributable to American to be protected by *Noerr,* while holding others to fall within *Noerr's* "sham exception." Virtually every application of *Noerr* in this case is challenged on appeal by either Federal or American. A preliminary review

of *Noerr* and related cases will place the parties' contentions in the proper light.

1. The *Noerr* Doctrine

In *Noerr,* trucking companies alleged that railroads, through a public relations firm, had violated section one of the Sherman Act by conducting a malicious and fraudulent campaign to gain passage and enforcement of laws that would harm the trucking industry in the long-haul freight market. Relying on legislative history and a desire to avoid any question of an unconstitutional infringement upon the First Amendment right to petition, the Supreme Court held unanimously that the Sherman Act was not intended to proscribe joint action "to persuade the legislative or executive to take particular action with respect to a law that would produce a restraint or monopoly." 365 U.S. 136.

> A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would . . . deprive the government of a valuable source of information and, at the same time, deprive people of their right to petition in the very instances in which that right may be of the most importance to them.

*Id.* at 139. The Sherman Act was thus read to regulate only "business activity," not "political activity." *Id.* at 137. Even the direct infliction of harm on a competitor is not subject to the Sherman Act, the Court held, so long as it is the incidental effect of a publicity campaign to influence governmental action. *Id.* at 143.

The Court also noted, however, that "a publicity campaign, ostensibly directed toward influencing governmental action, [may be] a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Id.* at 144. In order for the public relations activity to be immune from antitrust, then, the Court stated that it must be "a genuine effort to influence legislative and law enforcement practice." *Id.*

Subsequently, in *United Mine Workers v. Pennington,* 381 U.S. 657 (1965), the Court reiterated the holding that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." *Id.* at 670. The *Pennington* Court held that certain large coal operators and the United Mine Workers were not liable under the antitrust laws for jointly persuading the Secretary of Labor to set a minimum wage for employees of coal suppliers selling coal to the Tennessee Valley Authority, *id.* at 660, 670, even though this action was intended to drive smaller coal operators out of the market.

The Court elaborated upon *Noerr's* "sham exception" in *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972). The allegation in *Trucking Unlimited* was that the trucking company defendants jointly carried out a plan to oppose in regulatory governmental agencies and reviewing courts all of the applications for operating rights that were filed by carriers seeking to compete with the defendants. While holding that exercising access to the agencies and courts to oppose the grant of operating rights is protected by the First Amendment's right of petition,

the Court cautioned that such exercise is not necessarily immune from antitrust scrutiny:

> a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn the case is established that abuse of those processes produced an illegal result, *viz.*, effectively barring [plaintiffs] from access to the agencies and courts. Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression."

404 U.S. at 513.

2. *Noerr*-based Claims of Federal

We deal first with Federal's claims that the district court erred in holding that *Noerr* protected (1) The lobbying of state boards of pharmacy to promulgate and enforce regulations inhibiting mail order pharmacy; (2) the litigation brought against Federal by the Massachusetts Pharmaceutical Association and pursued in Iowa with the help of American, the National Association, and the Iowa Association.[6]

The lobbying by American and the National Association of Boards of Pharmacy that was directed at the state

[6]Federal does not elaborate upon its objection to the dismissal of the National Association of Retail Druggists, and we affirm, generally for the reasons stated in the district court's separate opinion on this issue, 471 F. Supp. 126-30, and because Federal has not proved that the actions of the Retail Druggists have caused it injury in fact.

boards of pharmacy is securely within the protection of *Noerr*. The state boards are governmental agencies empowered to regulate the practice of pharmacy. The lobbying by American and the National Association was a genuine attempt to secure governmental action.

Federal argues, however, that the activities of these organizations fall within *Noerr's* sham exception. Federal maintains that "the difference between protected activity and sham action depends on the competitive or anticompetitive purpose of exercising the right of petition and . . . evidence of such a purpose is a pattern of actions designed to accomplish the destruction of a competitor." Appellee's brief at 31. That, plainly, is not the law. Anticompetitive intent alone is not enough. Nor is it sufficient that the persons engaged in lobbying activity also engaged in "a pattern of actions." Both factors were present in *Noerr*, in which the Court held the complained of activities were beyond the scope of the antitrust laws. What is needed in addition is proof that the lobbyists subverted the integrity of the governmental process, that they effectively barred Federal's access to these processes, or that the nature of these processes made their invocation something other than the "political activity" that was recognized by the *Noerr-Pennington-Trucking Unlimited* line of cases to be beyond the scope of the Sherman Act.

The cases Federal cites in support of its peculiar view of the sham exception are easily distinguishable. In one set of cases, the integrity of the regulatory process was at stake. Attempts to influence governmental action through overtly corrupt conduct, such as bribes (in any context) and misrepresentation (in the adjudicatory process), are not normal and legitimate exercises of the right to petition, and activities of this sort have been held beyond the pro-

tection of *Noerr*.[7] Here, in contrast, there is no showing that American and the National Association engaged in any but legitimate political attempts to secure governmental action. In another set of cases, *Noerr* was held inapplicable because the defendants' actions were intended not to secure governmental action but to harm the plaintiff by abusing the relevant governmental process.[8] These cases are likewise inapposite, for there is no evidence that American effectively barred Federal's access to governmental bodies, that any of the American's adjudicatory actions were "baseless," or that American otherwise abused governmental processes by seeking an anticompetitive goal collateral to the result ostensibly sought in the proceeding.[9]

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[7] *Israel v. Baxter Laboratories, Inc.*, 466 F.2d 272, 274, 275-79 (D.C. Cir. 1972) (seeking to undermine fair and impartial functioning of administrative agency by misrepresentation and suppression of information); *Sacramento Coca-Cola Bottling Co. v. Teamsters Local 150*, 440 F.2d 1096, 1099 (9th Cir.), *cert. denied*, 404 U.S. 826 (1971) (using threats and other coercive measures to influence state fair officials); *Wood Exploration & Prod. Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1298 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (filing false nomination forecasts with state commission to reduce production allowables of other producers); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 29 (1st Cir. 1970), *cert. denied*, 400 U.S. 850 (1970) ("fraudulent statements and threats" to gain advantage over competitor seeking same government contract).

[8] *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) (abuse of processes "effectively barring. . . access to the agencies and courts"); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 379 n.9 (1973) (power company, while filing repetitive suits to prevent sale of bonds needed by competing city power systems, offered towns inducements to grant the power company a new franchise).

[9] It has been suggested that courts interpreting the limits of *Noerr's* sham exception should rely on the common law torts of malicious prosecution and abuse of process. *E.g.*, Note, *Limiting the Antitrust Immunity for Concerted Attempts to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process*,

In a third set of cases, upon which Federal chiefly relies, the defendant's activity is viewed in light of the nature of the governmental agency. Private efforts to influence governmental bodies acting in an economic rather than a political framework, *e.g.*, a governmental procurement agency, have been held unprotected by *Noerr* because these efforts, in *Noerr's* terms, constitute "business activity" rather than "political activity."[10] Here, by con-

86 Harv. L. Rev. 715 (1973). Resort to a malicious prosecution analogy is unavailing for Federal here, since there was no showing that any of the various proceedings American helped to institute against Federal were "clearly unreasonable." *See id.* at 728-29. Moreover, to succeed in an action for malicious prosecution the plaintiff must show that the earlier action against it failed. Yet the proceedings of which Federal complains most vigorously are those that resulted in governmental action adverse to it. Nor can Federal rely upon analogies to the tort of abuse of process. Although that tort lies even for meritorious litigation, it lies only if the purpose of the defendant's litigation is collateral to and *not the subject of his complaint. Id.* at 732. Here, American's avowed purpose in all relevant governmental proceedings was to stifle drug advertising or mail order pharmacy. Its anticompetitive purpose was not collateral to its invocation of governmental process but rather was inherent in it.

[10] *See, e.g., Hecht v. pro Football, Inc.*, 444 F.2d 931, 940-42 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (football team bargaining for a restrictive covenant in lease with government-owned football stadium not immune from antitrust suit by virtue of *Noerr*); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., supra* note 7, 424 F.2d at 33 (*Noerr* does not protect efforts to influence "public officials engaged in purely commercial dealings" and charged with the task of making "government purchases. . . according to strictly economic criteria."); *In re Airport Car Rental Litigation*, 474 F. Supp. 1072, 1091 (N.D. Cal. 1979) (those seeking to influence airport authorities in charge of licensing car rental operations were not entitled to antitrust immunity under *Noerr* because the authorities were "acting as a commercial entity influenced by economic concerns rather than as a policymaking unit of government."); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707-08 (1962) (Companies who influenced a private corporation acting as Canada's purchasing agent to exclude plaintiff from the relevant market were not immune under *Noerr* because they were "engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws.")

trast, *Noerr* is fully applicable, for the boards of pharmacy are charged with making regulatory decisions rather than commercial decisions.

Federal, however, disputes that the pharmacy boards are pure regulatory agencies. It emphasizes that many boards consist mostly if not wholly of community pharmacists who as a class compete with mail order pharmacy in the prescription drug market. Federal contends that these boards in inhibiting mail order pharmacy necessarily act in their commercial self-interest, and that the antitrust laws require licensing authorities to be free of commercial bias. Our own view of the antitrust laws is not so expansive. However desirable might be the goal of ridding government of the appearance of catering to special interests, the Sherman Act was not designed to achieve it. The composition of a state board of pharmacy is determined by state law, and is a matter to be corrected, if correction be needed, through the political process, not by application of the Sherman Act. To hold otherwise would be to ignore the plain fact that the Act was not meant to regulate political activity. *E.g., Parker v. Brown,* 317 U.S. 341 (1943), *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961).

Federal's final "sham" argument is that the district court should have found that each state board of pharmacy that opposed mail order was a participant in American's conspiracy. Given this finding, Federal contends, the efforts of American and its co-conspirators to have state boards enforce laws against the mail order houses would be unprotected by *Noerr* on the ground that *Noerr's* protection does not apply where the governmental agency is a co-

conspirator of those trying to influence it.[11] Federal's contention builds upon the district court's findings that the National Association of Boards of Pharmacy and each state pharmaceutical association were co-conspirators of American. Federal relies first on the relationship between each state board and the National Association – state board members automatically become members of the National Association and the active members of each state board select a delegate who, with other state delegates, determine the policies of the National Association. One of those policies, as noted above, was to ask "all state boards. . . to use every legal method to oppose the establishment of mail order houses." Federal also relies on the relationship between many state boards and the corresponding state pharmaceutical associations – in at least 14 states the board members, as required by state law, are selected from the membership of the state pharmaceutical

[11] *See, e.g., California Motor Transp. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) ("Conspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression."; *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962) (no *Parker v. Brown* immunity for companies given exclusive selling rights by private company exercising authority power as nation's purchasing agent and alleged to be a co-conspirator); *United Mine Workers v. Pennington*, 365 U.S. 657, 671 (1965) (no antitrust damages for "the act of a public official who is not claimed to be a co-conspirator; *Parker v. Brown*, 317 U.S. 341, 351-52 (1943) ("We have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade.") *But see Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 230 (7th Cir. 1975) (criticizing the public co-conspirator doctrine); Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the* Noerr-Pennington *Doctrine*, 45 U. Chi. L. Rev. 80, 115 (1977) ("in most cases the co-conspirator exception is unworkable and should not be recognized").

It seems doubtful that the existence of a public co-conspirator would explain any result more satisfactorily than one of the more established exceptions to the *Noerr* doctrine, see notes 7-10 *supra*.

association; in many other states (such as Iowa) the law has provided that the board members be selected from a list compiled by the state association. It is the delegates of the state associations, Federal emphasizes, who have a dominant voice in determining the policy of the American Pharmaceutical Association. Finally, Federal relies on American's boast that 16 state boards have responded to its request that cease-and-desist orders be issued against mail order pharmacies.

We hold as a matter of law that introduction of this evidence did not meet Federal's burden of showing that state board members participated in a conspiracy with the defendant. First, as to American's communications to the state boards, we decline to assign probative value to the fact that some state boards responded favorably. *Noerr* holds the antitrust laws are not intended to regulate genuine efforts to secure governmental action. That American's efforts were genuine is manifested by their success. It would make a nullity of *Noerr* to hold a state board to be a co-conspirator, and the petitioning activity directed at it thus unprotected, on the basis that the petitioning was successful. That a public official is persuaded by the entreaty of a lobbyist does not make him the lobbyist's co-conspirator.

For a similar reason we hold that evidence of overlapping membership in a case such as this is not to be treated as probative of conspiracy. Mere membership in associations is not enough to establish participation in a conspiracy with other members of those associations, much less in a conspiracy between those associations and yet another association. *E.g., Phelps Dodge Refining Corp. v. FTC,* 139 F.2d 393, 396-97 (2d Cir. 1943).

Federal contends that more than mere membership is involved, however, and relies on a "membership

ratification" theory to argue that American is responsible for the actions of the state boards. That reliance is misplaced. As articulated in *Phelps*, a leading case on membership ratification,

> the issue is reduced to whether a member who knows or should know that his association is engaged in an unlawful enterprise and continues his membership without protest may be charged with complicity as a confederate. We believe he may. Granted that his mere membership does not authorize unlawful conduct by the association, once he is chargeable with knowledge that his fellows are acting unlawfully his failure to disassociate himself from them is a ratification of what they are doing. He becomes one of the principals in the enterprise and cannot disclaim joint responsibility for the illegal uses to which the association is put.

*Id.* Under the membership ratification theory, liability is imposed upon members of an association who knowingly acquiesce in its unlawful conduct.[12] Applied here, this theory would, at most, make individual members of some state boards liable for the conduct of the National Association of Boards of Pharmacy or the relevant state pharmaceutical association. We are not aware of a case in which the theory was held to work backwards, and make the association liable for the conduct of individual members. For that to happen it must be shown that the members were acting with apparent authority conferred

[12]For further discussion of the membership ratification doctrine, see *Kline v. Coldwell, Bankers & Co.*, 508 F.2d 226, 231-33 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

upon them by the association,[13] and we decline to treat as probative of any such authorization the use of legitimate forms of communication to influence governmental action. A different case would result were it shown that state board members were bribed by American, or met in an unlawful fashion with its officers, or were otherwise induced by American, *by means other than legitimate lobbying and publicity,* to take action against mail order houses. Evidence of this sort does not appear on the record.

Federal's other allegation of misapplication of *Noerr* – that the Massachusetts-Iowa litigation fits within the sham exception – has no more merit than the first. The district court found the litigation was *not* baseless or frivolous, that there was no showing of any abuse of the judicial process, and that Federal was not denied meaningful access to the appropriate judicial forums. These findings are not clearly erroneous, and again we affirm.

3. *Noerr*-based Claims of American

This brings us to American's contention that the district court erred in finding some of its activities unprotected by the doctrine of *Noerr.* We begin with the weightiest of American's *Noerr*-based contentions – the claim that American was not responsible in damages for the actions of the Iowa Board.

The district court's holding that American was liable for these actions appears to rest on two alternative rationales: (1) The Iowa Board's processes were abused by the private groups – American and the Iowa and Nebraska Associations. (2) The members of the Iowa Board were themselves

[13] *E.g., Hydrolevel Corp. v. American Society of Mechanical Engineers,* 635 F.2d 118, 125-27 (2d Cir. 1980).

part of the illegal conspiracy, making a fair administrative process impossible. 484 F. Supp. 1209.[14] Because either finding may be sufficient to invoke the sham exception and remove *Noerr* immunity for American, we examine each independently.

Just how American and its non-governmental co-conspirators abused the processes of the Board does not appear in the district court's opinion. Insofar as the record reveals, the conspirators simply requested the Iowa Board to enforce the law as they saw it. The district court's position is not aided by its statements that "[t]he conduct of board members, as administrative officials responding to private initiatives, is subject to closer scrutiny under the *Noerr* doctrine than that of state legislators," and that "[t]his conduct is also less protected where, as here, the focus of administrative decisionmaking shifts from general policy concerns toward particular, discretionary judgments responsive to commercial considerations." 484 F.Supp. at 1209. The proper focus in determining whether *Noerr* applies is not on the conduct of the governmental officials, but on the conduct of the petitioners. It is true that courts have considered the type of governmental body involved (legislative, administrative, or adjudicative) when determining whether *deliberate misrepresentations* are protected by *Noerr,* in line with the thinking that "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *California Motor Transport v. Trucking Unlimited,* 404 U.S. 508, 513 (1972). And the type of governmental body may shed light on whether the petitioners were engaging in "political activity." *See* note 10 *supra.* But where, as here,

[14]This finding of the district court contrasts, of course, with the finding it made as to all of the other state boards. See 484 F. Supp. at 1204; TAN 11 *supra.*

the activities complained of consist of traditional attempts to induce regulatory action, it ill serves the policies underlying *Noerr* to make the protection of the lobbying depend on the "administrative" or "legislative" nature of the lobbied government agency.[15]

The district court's other ground for holding American responsible for the Iowa Board's actions against Federal is the finding that the Iowa Board members were themselves conspirators with American.[16] In this connection the focus properly is on the conduct of the governmental officials, to the extent it bears on their participation in a conspiracy.

With but one exception, the evidence to support the finding that the Iowa Board conspired with American is coextensive with that supporting Federal's properly rejected contention that every state board was a co-conspirator of American. See TAN 11-13 *supra*. The sole exception is the

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[15]The focus in a *Noerr* inquiry is on the conduct of the petitioners because the aim of the *Noerr* doctrine is to encourage legitimate exercises of the right to petition. The distinct but related goal of encouraging public-spirited official decisionmaking is served by the doctrine of official immunity, which in varying extents protects government officers from individual liability for their official acts. It is with respect to official immunity (an issue not involved here inasmuch as no public official is a defendant) that there is a well-established distinction between "legislative" and "administrative" functions. *See, e.g., Scheurer v. Rhodes*, 416 U.S. 232, 247 (1974) (while immunity for judges and legislator is absolute, immunity for officers of executive branch depends in part "upon the scope of discretion and responsibilities of the office."); *accord, Butz v. Economou*, 438 U.S. 478, 508-17 (1978). We think it unnecessary and inappropriate to import that distinction into a *Noerr* analysis.

[16]The court was apparently relying on a line of dicta that the antitrust laws apply in full when the governmental body sought to be influenced is a co-conspirator of those trying to influence it. For further discussion of this point, see note 11, *supra*.

evidence of the Iowa Board's unusually aggressive stance against mail order pharmacy – delaying, withholding, and revoking Federal's license, supporting action aimed at an injunction against Federal's out-of-state prescriptions, imposing "unusual and burdensome inspection conditions on it," and administratively denying Federal the right to employ pharmacist interns. The district court rejected the explanation that these actions were taken out of concern for the public health and safety; rather, it concluded, they "followed [American's] action proposals and were taken to further [American's] objectives, often without regard to the requirements of Iowa law." 484 F.Supp. at 1204.

While having no occasion to quarrel with the district court's subsidiary factual findings, we consider the court was clearly erroneous in its ultimate finding that the Iowa Board members unlawfully conspired with American. Accepting as true that the board members acted in conformance with American's economic goals rather than solely in selfless dedication to the public good, we decline, given the availability of a better explanation for their conduct, to treat the parallel conduct as significant probative evidence of an unlawful conspiracy with American.[17] Although parallel behavior may support an inference of conspiracy when the alleged co-conspirators have acted in a way inconsistent with independent pursuit of economic self-interest, that inference is warranted only when a theory of rational, independent action is less attractive than that of concerted action. *Compare Interstate Circuit, Inc. v. United States,* 306 U.S. 208 (1939) *with First Na-*

[17] *See generally United States v. Gypsum,* 333 U.S. 364, 395 (1948) ("A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.")

*tional Bank v. Cities Service Co.*, 391 U.S. 253 (1968).[18] The behavior of the Iowa Board in this case is not of the kind that could only make sense in the context of the behavior of others; rather, it can be persuasively explained by the exercise of rational, independent judgment. If we take as true Federal's claim that the Board was dominated by community pharmacists pursuing commercial self-interest, then the Board's action in attempting to hinder Federal's operation is explained as simply an effort to serve the economic interests of the Board members and their professional peers. If instead Federal is wrong and the Board was actually seeking in good faith to advance the public interest, the inference that it unlawfully conspired with American is weaker yet. We thus conclude that the most convincing explanations of the Board's conduct do not support the theory that board members were participants in an unlawful conspiracy with American.

American cannot be held liable, then, for damages resulting from its genuine and legitimate attempts to secure governmental action, whether through financing lawsuits, lobbying legislatures, or petitioning administrative bodies.

B. *Issues of Damages*

Remaining for our consideration are several concerted activities that, like the activities of the Iowa Board, were found to be both attributable to American and hindrances to Federal's economic performance during the statutory period of recovery. American would have us rule that all of these activities are privileged under the *Noerr* doctrine,

[18] *See generally Bozusian v. Gulf Oil Corp.*, 561 F.2d 434, 446-47 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); *FTC v. Lukens Steel Co.*, 454 F. Supp. 1182, 1188-91 (D.D.C. 1978).

arguing that *Noerr*, with its First Amendment underpinnings, cannot be limited to exercises of the right to petition but must extend to a broad variety of expressional and associational activity as well.[19] We decline that invitation to go so boldly where few courts have gone before, for we perceive that the district court's judgment of damages should be reversed on a narrower ground: Federal has failed to show that these activities, even if unprivileged antitrust violations, have caused it injury in fact.

The district court found harm to Federal to emanate from these remaining antitrust violations: (1) a "group boycott" among American and its co-conspirators, "specifically directed at Federal" with "the intended and necessary effect of excluding or impeding Federal and other mail order pharmacies from access to retail customers"; (2) American's prohibitions on advertising, (3) the concerted opposition to discounting, and (4) the restrictive applications of the Code of Ethics affecting non-members. In examining these findings we enquire in each instance whether Federal has shown that the conduct in question has caused it injury in fact.

We note at the outset the underlying statutory law: "Any person who shall be *injured* in his business or property *by reason of* anything forbidden by the antitrust law may sue. . . and shall recover threefold the damages sustained by him." 15 U.S.C. § 15 (emphasis added). To

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[19]American cites *Missouri v. National Org. for Women*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 101 S. Ct. 122, 66 L.Ed. 2d 49, ___ U.S. ___ (1980) (boycott of convention facilities in ostensible effort to force legislative action not actionable under the antitrust laws), and *Feminist Women's Health Center v. Mohammad*, 586 F.2d 530, 545 n.12 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979) (noting freedom of speech as well as right to petition might limit reach of antitrust laws, although this is doubtful).

recover damages, then, the plaintiff must prove not only an antitrust violation but the causal link between the violation and an injury to his business or property. Courts have recognized "a clear distinction between the measure of proof necessary to establish the fact that [the antitrust plaintiff] ha[s] sustained some damage, and the measure of proof necessary to enable the [factfinder] to fix the amount." *Story Parchment Co. v. Paterson Paper Parchment Co.*, 282 U.S. 555, 562 (1931). The quantum of damages "can be estimated on any reasonable basis," but first the "fact of injury" must be "certainly proved." *Poster Exchange, Inc.v. National Screen Service Corp.*, 431 F.2d 334, 340 (5th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971). We need not reach the question whether the district court reasonably estimated the amount of damages, for we hold it erred in finding that Federal was definitely harmed by any actionable conduct attributable to American.

1. Group Boycott

A person is injured, not by a conspiracy in vacuo, but by overt acts ascribed to it. The court's finding that American and others had engaged in a group boycott against Federal apparently rested on a number of specific activities, in addition to those that the court listed as separate violations of the Sherman Act.[20] One act that the court attributed to the boycott was the collusion between the Nebraska and

[20]American, relying on *Smith v. Pro Football*, 593 F.2d 1173, 1178 (D.C. Cir. 1978), argues with some force that the district court erred in classifying the anti-mail order pharmacy campaign as a "group boycott" constituting a per se violation of the Sherman Act. We note this contention without ruling on it, believing that the legality of American's conduct need not be determined, whether under a per se or a "rule of reason" analysis, given the lack of any demonstrated injury resulting from that conduct.

Iowa Pharmaceutical Associations that resulted in the 1965 revocation action against Federal for the filling of a forged prescription. The court found that "[t]he claim that Federal was required to incur extra, precautionary expense to avoid filling forged prescriptions attributable to the conspiracy was supported by persuasive proof only as to Iowa Board's revocation proceeding." 484 F.Supp. at 1213. The court acknowledged that "the extra expense of checking for forgeries following the 1965 revocation proceeding had largely dissipated by 1971," the beginning of the statutory recovery period, *id.*, but then held, without revealing the source of its estimate, that Federal was entitled to $6,000, trebled to $18,000, for its "additional 'checking costs' " over the relevant recovery period. *Id.*

The sole evidence that additional forgery-checking expenses resulted from American's conduct is the testimony of two Federal proprietors – Roland Rasmussen, its chief pharmacist, and Craig W. Sandahl, its president. Rasmussen testified that Federal checked each prescription for abuse-prone medication against a signature file which contained the number assigned to the prescriber by the Bureau of Narcotics and Dangerous Drugs (BNDD) or the Drug Enforcement Agency (DEA). In the event of a discrepancy, Federal made inquiries by telephone or mail to ensure that the prescription it received was truly authorized by a licensed prescriber. The unique feature of Federal's system, Rasmussen explained, was the maintenance of the signature file. He testified that "our problem is that so many of our forged prescriptions were coming from experts, from pharmacists, and Pharmacy Board members and Pharmacy Association members, to check." Tr. 78. "If you were in a store where you did not have to be concerned about the Pharmacy Board sending a bunch of forged prescriptions," Rasmussen added,

"checking wouldn't be nearly the same problem." *Id.* Sandahl similarly explained that Federal instituted extensive precautions. "Otherwise, we are going to be hauled into court time after time after time." Tr. 1334. His only specific explanation of Federal's safeguards against filling forged prescriptions was that Federal carried a segregated BNDD list, "an independent list to try and ascertain that that is, in fact, the man." Tr. 1334. "Before the BNDD came out and said you must segregate, and they gave us a list, or began to have a schedule of drugs, we had our own file." Tr. 1335. Sandahl estimated that additional safeguards had cost $125,000 over the period 1963-77.

On the basis of this evidence we think it too speculative to find that American was responsible for Federal's extraordinary forgery checking expenses, given the availability of alternative explanations for those expenses. First among these explanations is the decree in the 1965 state court order annulling the revocation of Federal's pharmacy license. Although granting Federal the principal relief it sought, the state court also ordered Federal "[b]efore filling any mail order prescription, to peruse the same carefully to determine that it appears genuine on its face, and if it does not, to contact the prescribing physician."[21] Further, in the early 1970's, the federal government issued regulations under the Comprehensive Drug Abuse Prevention and Control Act which place responsibilities on pharmacists with respect to the requirements that precriptions for controlled substances (1) include certain data (the patient's name and address and the

[21] *Board of Pharmacy Examiners v. Federal Prescription Service,* No. 26, 762, slip op. at 9 (Iowa Boone County Ct. Nov. 10, 1965), *reprinted in Appellee's Appendix at 222.*

prescriber's registration number) and (2) be a bona fide prescription for a legitimate medical purpose. Tr. 1335.[22] Finally, while there was testimony that Federal took anti-forgery precautions more extensive than those taken by a traditional community pharmacy, the community pharmacy by its nature has less need for elaborate precautions. Community pharmacists have some familiarity with those who write prescriptions in their own area, and samples of prescribers' signatures are readily available in the pharmacist's files. A mail order pharmacy such as Federal, on the other hand, serves an unseen clientele over a nationwide market. It is not similarly situated and some higher decree of precaution is naturally to be expected. Sandahl acknowledged that Federal maintained a physicians' registry and checked on apparent forgeries right from the beginning of Federal's operation. Tr. 1241-42. He stated that the damages claimed for forgery checking were for "taking care of the special segregated prescription file, . . . what later was a signature file, and for taking care of the time and effort of looking up and having to phone doctors." App. 132. The evidence supports the conclusion that Federal's safeguard system antedated and proceeded independently of any forged prescription scheme that might be attributed to American. It was Federal's legal obligation and a prudent pharmaceutical practice to go to the lengths it did. It would thus take far more detailed proof than the *ipse dixit* of Federal's owners to show that there was a causal connection between American's

[22]See 36 Fed Reg. 7799 (April 24, 1971), codified at 21 C.F.R. §§ 306.04(a), 306.05(a). The district court found that the period for which Federal could collect damages under the statute of limitations, 15 U.S.C. § 15(b), commenced on November 24, 1971.

participation in any forgery scheme and injury to Federal.[23]

Other activities performed pursuant to the alleged "group boycott" included: writing letters of protest to magazines that advertised mail order pharmacy; requesting American's members to write articles for local medical journals decrying the use of mail service pharmacies; and informing pharmacy, student, and health groups (through correspondence, publications, and speeches made by American officials) of American's opposition to mail order pharmacy and the drug price advertising on which it depended. It appears that these were among the activities the district court had in mind when it held unlawful the "concerted opposition to discounting." 484 F. Supp. 1207.

These activities are too remote from any injury sustained by Federal to meet the "reasonably certain" test of injury in fact under the antitrust laws. Although the conduct of American and its co-conspirators was said to have the "necessary effect of excluding or impeding Federal. . . from access to retail customers," 484 F.Supp. at 1207, we find no significant probative evidence of such effect. American's campaign was an attempt to galvanize the health community into a unified political opposition to the threat of mail order pharmacy; it had no demonstrated effect in depriving Federal of either suppliers or

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[23] *See Shumate & Co., Inc. v. National Ass'n of Securities Dealers, Inc.*, 509 F.2d 147, 152 (5th Cir.), *cert. denied*, 423 U.S. 868 (1975).

Our conclusion that no damages in the form of extra checking costs are definitely attributable to the 1965 forgery scheme and revocation makes it unnecessary to consider whether American, which did not directly participate in the scheme, can be held liable for its consequences.

customers. Federal has maintained that the fact of its injury is a "self-evident conclusion," but rather than citing any record support for its position has simply referred us to the district court opinion. The district court found that "Federal felt the need to exercise restraint in view of the concerted opposition it faced from pharmacists and state officials to its methods of doing business." 484 F.Supp. at 1210. It thus "tended to avoid forms of advertising that would unduly emphasize its price-cutting schedule and to this extent the conspiracy must be held partially responsible." *Id.* These findings do not support a conclusion of injury in fact, especially in light of the court's additional finding that "Federal was in fact able to continue to advertise even in states where such advertising was prohibited by law." *Id.* The hindrances on Federal's advertising emanated from acts of government and not to any activity of American that can be found to be actionable in light of *Noerr*.

The district court also noted that American in several instances had urged magazines to reject advertising proposals by other mail order pharmacies, and that eight magazines, for various asserted reasons, had rejected advertising proposed by Federal. The court found "no proof," however,

> that direct intervention by [American] or any co-conspirator was responsible for these business decisions, although it may be inferred that the general campaign of [American] had some indirect effect upon some of these and upon other advertisers. However, Federal was soon primarily interested in advertising only in publications of organizations willing to sponsor its services and for practical purposes abandoned efforts to advertise in publications of general circulation.

> Moreover, many organizations had valid reasons independent of APhA's campaign for refusing to sponsor Federal.

484 F.Supp. 1210. This finding of a failure of proof is amply supported in the record. We find no basis, however, for the inference that American's anti-mail order pharmacy campaign had an "indirect effect" on advertisers. To the extent that this effect emanated from American's general publicity campaign, it is nonactionable under *Noerr* as the incidental result of an effort to influence governmental action.

2. Additional Elements of the Boycott

The court singled out two additional elements of the boycott; the Code of Ethics ban on advertising, and the Code's application even to those who work for nonmembers of American. 484 F. Supp. at 1207. Again, there is insufficient evidence to conclude that these practices caused Federal injury. In states that did not adopt American's Code as state law, the advertising ban affected only members of American; only its members could be subjected to disciplinary action for engaging in activities proscribed by the Code. Federal's proprietors, and nonmembers, were thereby placed under no restraint. In fact, to the extent American's Code restrained advertising of Federal's competitors, it presumably benefitted Federal. In states that did adopt American's Code as state law, Federal may well have been adversely affected, but since the source of the effect was state action Federal has no recourse under the antitrust laws. *See Bates v. State Bar*, 433 U.S. 350, 359-63 (1977) (restraints upon attorney advertising imposed by Supreme Court of Arizona wielding power of state not subject to attack under the Sherman Act). *See generally Parker v. Brown*, 317 U.S. 341 (1943).

The Code provisions that effectively banned employment in mail order pharmacy present a distinct question, for these provisions, in theory at least, could have harmed Federal by hindering its access to pharmacist employees. It is true that Federal was unable to secure certification to hire pharmacist interns, but this resulted from action of the Iowa Board of Pharmacy Examiners and was not attributable to American's conspiracy. Federal's president and chief pharmacist did testify, albeit conclusorily, that Federal had "difficulty at times" in hiring pharmacists (Tr. 1247-50, 1456, 1470). Some applicants said they came despite the advice of the American Pharmaceutical Association, and other persons told the plaintiffs they would not "want to come to work for [Federal's] kind of operation." (Tr. 1249.) However, when it is considered that only one-third of the nations' 125,000 pharmacists be nged to American, and that there is no allegation or proof that Federal's undocumented difficulty in hiring pharmacists caused it actual harm (by, for example, requiring it to turn away business or pay overtime), we think Federal's evidence is once again too scant to support a finding of injury in fact.

In the period 1972-77 Federal's sales did decline from $1,619,094 to $1,138,455 and the company did either lose money or make only a marginal profit in each year. 484 F. Supp. at 1212. As the district court noted, however, the existence of antitrust violations was not the only available explanation for this lack of business success. The district court cited a number of factors, including a prolonged strike in the early 1970's by Federal clerical personnel, the existence of legal impediments in most of the states, a general decline in the mail order pharmacy business as a result of more aggressive merchandising by the chain store pharmacies, and the competition of other mail order phar-

macies, such as that run for the benefit of the American Association of Retired Persons. 484 F. Supp. 2110-12. Viewing the case as a whole, we are persuaded that the court was clearly erroneous in finding that Federal met its burden of proof on the question of injury in fact.

3. Individual Damage Claims

The three proprietors of Federal also claimed damages for injury in their individual business and property. The district court denied each of their claims, because the proofs were not particularized, because Federal compensated them for the time they expended in combatting American's conspiracy, or because injuries to private affairs, unrelated to business considerations, are not recoverable under the antitrust laws. 484 F.Supp. at 1213-14. We find the district court's analysis in these respects free from error and we thus affirm.

## III. Conclusion

In sum, although the evidence may support a conclusion that American engaged in a number of activities violative of the spirit of the antitrust laws, those activities were not shown to have materially contributed to Federal's injury, or appear to have harmed Federal only through the intervention of governmental action, which is not subject to the antitrust laws. We thus reverse the award of damages.

*Judgment accordingly.*

## APPENDIX B

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
September Term, 1981

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No. 80-1359
Civil Action No. 77-1163

Federal Prescription Service, Inc. et al.,
Appellees

v.

American Pharmaceutical Association,
Appellant

William S. Apple, et al.
ARGUED 4-27-81

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And Consolidated Case No. 80-1368

BEFORE: MacKinnon and Edwards, Circuit Judges and Ronald N. Davies*, Senior District Judge for the District of North Dakota

### ORDER

On consideration of appellees' petition for rehearing, filed August 26, 1981, it is

*Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

**ORDERED** by the Court that the aforesaid petition for rehearing is denied.

*Per Curiam*

*For the Court:*

*George A. Fisher,*
*Clerk*

*BY: /s/ Robert A. Bonner*
*Chief Deputy Clerk*

**UNITED STATES COURT OF APPEALS**
**for the District of Columbia Circuit**

**FILED SEPT. 8 1981**

**GEORGE A. FISHER**
**CLERK**

## APPENDIX C

| | | |
|---|---|---|
| FEDERAL PRESCRIPTION SERVICE, INC., *et al.*, Plaintiffs, | ) | |
| v. | ) | Civil Action No. 77-1163 |
| AMERICAN PHARMACEUTICAL ASSOCIATION, Defendant. | ) | |

United States District Court,
District of Columbia.
Feb. 14, 1980

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George S. Leonard, Alexandria, Va., for plaintiffs.

Arthur B. Hanson, Michael H. McConihe, Washington, D.C., Joel E. Hoffman, C. Coleman Bird, Washington, D.C., for defendant American Pharmaceutical Ass'n.

Richard M. Rindler, Washington, D.C., for former defendant National Ass'n of Retail Druggists (summary jugdment granted for this defendant 3/27/79).

Jerry D. Voight, Washington, D.C., James L. Siekmann, Chicago, Ill., for former defendant National Ass'n of Boards of Pharmacy (dismissed as a defendant 6/6/79)

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

GESELL, District Judge.

Federal Prescription Service, Inc. ("Federal"), a mail-order pharmacy, and certain of its officers, sue American Pharmaceutical Association ("APhA"), a national organization of pharmacists, claiming damages resulting from alleged violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 ("the Act"). Plaintiffs charge that APhA, acting alone or in combination with various named co-conspirators pursuant to anti-competitive policies established by its House of Delegates, restrained and depressed Federal's interstate sales of prescription drugs by mail. After extensive pretrial proceedings, the case was tried to the Court without a jury. Following submissions of proposed findings, briefs, and oral argument, the Court enters its findings of fact and conclusions of law based on the voluminous trial record developed.

### I. *Trade and Commerce in Prescription Drugs*

Prescription drugs are those drugs which according to federal or state law may be dispensed to the buyer only upon presentation of a valid prescription. Prescription drugs are commodities sold in the course of interstate commerce. These drugs have an annual sales volume of approximately 10 billion dollars. Valid prescriptions are issued primarily by medical doctors and also by veterinarians and dentists. In normal course, prescriptions are filled by licensed pharmacists. There are approximately 125,000 such pharmacists in the United States.

Pharmacists usually operate or are employed by stores serving local communities. These stores compete among themselves in a given areas. Some such stores specialize in drug sales, others include pharmacies as part of a more diversified retail service that includes non-drug items.

Competition is also provided by labor or other organizations providing drug services for their members, hospital outpatient services, and mail order pharmacies such as Federal. Local pharmacies are principally independents and chain stores. The independents comprise about 60 percent of the total. The balance are mostly chain stores and some hospital pharmacies.

II. *Federal and the Mail Order Business*

Federal is primarily a mail order pharmacy that does business throughout the United States operating from its plant and offices in Madrid, Iowa. It is incorporated under the laws of Iowa and commenced its mail-order pharmacy business in approximately August, 1963.

The mail order pharmacy is a relatively recent method developed for prescription drug distribution. Although licensed to operate as a pharmacy only by the state or states in which it is located, a mail-order pharmacy solicits persons to send it prescriptions by mail from anywhere in the United States and returns the drugs by mail to the buyers. This form of drug distribution became of competitive consequence to the established independents in the late 1950's and early 1960's. The number of mail-order pharmacies was never large. Many had a brief existence and few survived for any appreciable period. As far as the record shows there were no new entrants in the 1970's.

Because mail-order pharmacies are subject to the delays inherent in the use of the mails, they primarily serve older people who often require long-term medication by what are known as maintenance drugs. Most prescription drugs, including maintenance drugs, are compounded in advance by the manufacturer and accordingly a large number of mail ordered prescriptions can be filled each day by a single pharmacist.

In order to maintain a sufficient volume of prescriptions a mail order pharmacy necessarily seeks to reach customers by advertising and offers discounted prices — at least on some items. The fact that mail order pharmacies rely of necessity on advertising and discounting was well known at all relevant times to APhA and pharmacists generally. A wide variety of choices exists for placing such advertising in national publications, local newspapers and in-house organs of specialized membership organizations, notably organizations willing to sponsor the mail-order seller. Customers requiring maintenance drugs are particularly attracted by lower prices.

III. *APhA*

APhA, the sole defendant in this action,[1] is the national professional society of pharmacists in the United States. It is a non-profit corporation incorporated and operating under the laws of the District of Columbia. The Association was founded in 1852 and its membership is now approximately 60,000 members from all states and territories, consisting primarily of practicing pharmacists and including pharmaceutical scientists, pharmacy educators and government-employed pharmacists. Associate membership in APhA is open to any idividual not eligible for active membership. Student membership in APhA is open to any undergraduate student enrolled in an accredited school or college of pharmacy. Approximately 15,000 individuals hold student membership in APhA. Approximately one-third of all practicing pharmacists in the United States are APhA members.

APhA encouraged and supported local associations in every state. In seventeen states affiliation agreements with

[1]The original complaint named three other defendants. These were dismissed for various reasons in the course of pretrial proceedings.

local associations promoted joint membership in both the local and national association and tended to establish APhA's policies as the standards followed at the local level.

From as early as 1960, APhA's Constitution has outlined in broad general terms its undertaking to promote the interests of pharmacists in the areas of health, education, interprofessional relations, regulations, etc., including the development and maintenance of a Code of Ethics.

APhA policies are established by its House of Delegates. Delegates are appointed by recognized or affiliated state pharmaceutical associations and national associations, and by other divisions of APhA. APhA Trustees, Past-Presidents and Judicial Board Members also are delegates. In the interim between House of Delegates meetings, the Board of Trustees is authorized to act for the House of Delegates.

Policy recommendations considered by the House of Delegates are formally initiated by Policy Committees on Public Organizational and Professional Affairs, consisting of eleven members each. Each Policy Committee's recommendations are subjected to a public hearing before a reference committee, which then submits its own recommendation to the House of Delegates as to whether each policy recommendation should be adopted, rejected or referred back to the Policy Committee by the House of Delegates.

As will by developed in more detail, APha established a policy of consistent and vigorous opposition to mail-order pharmacies. During the relevant period, APhA broadly publicized its concerns regarding mail order pharmacies in speeches by its officers and staff, in its official statements and responses to inquiries, and in its publications.

APhA's publications are used as a means of constantly communicating with APhA's members regarding its policies and activities. Both the *Journal* and newsletter are provided to all APhA members. The *Journal* is distributed also to state pharmaceutical associations.

IV. *The Alleged Violations of Antitrust Laws*

Federal's claims have been clarified and refined in the normal course of pretrial and trial. Several violations of the antitrust laws are urged in support of Federal's claims for substantial damages. Generally the antitrust violations alleged fall under two broad headings. It is contended that APhA alone and in conjunction with certain co-conspirators

(1) conducted a far-reaching campaign in the nature of a boycott directed to the public, its pharmacist members and health groups generally, specifically designed to discredit mail-order pharmacies, including Federal, for the purpose and with the effect of preventing mail order competition with established pharmacy outlets;

(2) encouraged pharmacists, acting through state regulatory boards and other organizations, to bring civil and criminal actions against Federal and its pharmacist Rasmusen, an individual plaintiff, and to implement state laws and regulations designed to hamper or prevent mail order pharmacy sales.

These claims must be further identified and particularized in the light of the proof to determine their legal significance under the antitrust laws and the nature of their effect of the business of Federal.

V. *APhA's Campaign to Discredit and Restrain Mail Order Pharmacies*

From as early as 1960, APhA as a matter of its established policy opposed the distribution of prescription

drugs by mail. It coordinated its efforts in this regard with other groups, including its own local associations in every state. Although this opposition was usually couched in terms of a concern that mail order pharmacies undermined the pharmacist-patient-physician relationship and thus threatened patient safety or public health, in fact APhA throughout was motivated primarily by its concerns for the economic well-being of its members. The validity of the health concerns, repeatedly expressed, was never satisfactorily supported at trial. Moreover, these concerns in no way justified the generalized indiscriminate attack on all mail order pharmacies which occurred. *See National Society of Professional Engineers v. United States* 435 U.S. 679, 695-96, 98 S.Ct. 1355, 1367-68, 55 L.Ed.2d 637 (1978).

APhA, the National Association of Boards of Pharmacy ("NABP"), and the National Conference of State Pharmaceutical Association Executives ("NCSPAE") held a conference in Washington, D.C., on January 6, 1960, for the purpose of discussing mail order dispensing of prescription drugs. The conference was attended by secretaries of numerous state boards of pharmacy and state pharmaceutical associations as well as representatives of APhA. It was decided to oppose mail order pharmacies. Various recommendations for approaching the mail order prescription situation were made, ranging from the seeking of state and federal laws through legislation or administrative rulings to incorporating a specific statement in the APhA Code of Ethics relating to mail order pharmacy.

The results of this conference were widely publicized and the cooperation of other affected groups such as the National Association of Retail Druggists ("NARD"), and American College of Apothecaries ("ACA") was encouraged.

A report of the 1960 conference was published in the APhA *Journal* in February of that year, and copies of the report were later distributed by NABP to secretaries of its member boards of pharmacy.

In April, 1960, APhA reported in its *Journal* that certain state regulatory agencies, state associations, and other organizations had taken action regarding mail order pharmacies.

APhA adopted a policy condemning the commercial promotion of prescription drugs to the public. This policy and the already established opposition to mail order selling generally were amplified and tightened as time went on.

> In May, 1965, a formal resolution read: Resolved: That the Association unequivocally oppose the circumvention of state pharmacy laws, the destruction of the physician-patient-pharmacists relationship and the obvious opportunity for diversion of drugs to illegitimate uses presented by all prescription mail order schemes; and Be it further resolved: That the Association provide guidance to the several state societies to assist them in protecting the welfare of the public from such mail order operations; and
> Be it further resolved: That the Association again encourage the Congress to review the problems associated with the improper distribution and use of drugs obtained by mail order.

APhA, through various resolutions and revisions of its Code of Ethics as interpreted by its Judicial Board established in 1967, took vigorous steps to establish two major prohibitory provisions: that pharmacists who participated in any way in mail order selling of prescriptions were unethical, and that advertising of prescription drugs,

a course of conduct essential to the mail order method of business, should be condemned and forbidden.

In November, 1968, the Judicial Board held that under the 1960 version of the APhA Code of Ethics eleven forms of discount and price advertising of prescription drugs which had been submitted to it were unethical. None was found acceptable.

In 1969, the Code of Ethics was further particularized to make clear that no member pharmacist could participate in any plan for pharmaceutical service which eliminates the pharmacist-patient-prescriber relationship. This was specifically directed against mail order concerns. This action included a new section that banned any solicitation of pharmacy practice by advertising, reading as follows:

> A pharmacist should not solicit professional practice by means of advertising or by methods inconsistent with his opportunity to advance his professional reputation through service to patients and to society.

The 1969 revision also made unethical any continued employment by the pharmacist members of APhA in pharmacies that did not conform to the other requirements of the Code of Ethics, whether or not their employers were pharmacists or were members of APhA. This requirement of the Code was confirmed by a Judicial Board ruling in 1970. In April, 1970, the Judicial Board issued an Advisory Opinion holding that under the APhA Code of Ethics, pharmacist members had to choose between continuing their employment with a non-complying employer and being held responsible for his violations of the APhA Code of Ethics.

In May, 1971, the Judicial Board issued a further Advisory Opinion holding that a pharmacist practicing in a

mail order pharmacy would be presumptively deemed to be engaged in unethical conduct within the meaning of the APhA Code of Ethics.

The Code of Ethics as stated or interpreted was a mandatory requirement and obedience to its strictures was specifically identified in APhA's By-Laws as a prerequisite to membership in APhA. At all times relevant to this lawsuit, APhA has been fully aware of the possible antitrust consequences of its Code of Ethics provisions and supporting activities. By 1969 it obtained opinions of counsel warning of potential legal problems prior to the adoption of a Code of Ethics containing the challenged provisions. Following the institution of an action against APhA by the Department of Justice in 1975, challenging the validity of the advertising ban in the 1969 Code of Ethics, APhA further amended its Code of Ethics to limit that prohibition.

Thus, in December, 1975, the flat advertising ban was removed from the Code of Ethics and the following substituted:

> A Pharmacist should strive to provide information to patients regarding professional services truthfully, accurately, and fully and should avoid misleading patients regarding the nature, cost, or value of the pharmacist's professional services.

No change has to date been made in the Code to eliminate the nonconforming employer provision or the prohibition on member employment by a mail order pharmacy. These provisions remain in force today.

APhA broadly publicized its opposition to mail order pharmacy in speeches, publications, official statements, and responses to inquiries. APhA's chief executive officer, Apple, and other officials speaking throughout the coun-

try, continuously criticized the solicitation of professional pharmacy practice by means of advertising. APhA wrote letters to consumer-type publications, urging them not to publish mail order advertising and attempted to discourage possible entrants into the mail order pharmacy business. The Code of Ethics and resolutions adopted by the APhA House of Delegates were published and disseminated to pharmacists and others through APhA's monthly *Journal,* through official bulletins and newsletters issued periodically, through staff correspondence, and through speeches made by APhA officials to state and local pharmacy associations and boards, student groups and other health-type organizations. The Code and resolutions attained further prominence in the course of APhA's on-going support for or opposition to legislation and litigation concerning mail order pharmacy issues.

Among the claims made against mail order pharmacies, none of which was shown to apply to Federal, were claims of illicit drug traffic, delay in filling prescriptions, use of nonprofessional personnel, lack of accessibility of prescription files, and failure to work with the prescribing physician.

Partly as a result of APhA's efforts, 18 state associations adopted the APhA Code of Ethics, six state boards of pharmacy adopted it by reference as a code of professional responsibility governing all licensed pharmacists in such states, 16 states adopted laws or regulations forbidding mail order practice, and 30-35 states adopted laws or regulations prohibiting the advertising of prescription drugs. The exact extent of APhA's responsibility for these developments either because of direct actions or those of others collaborating with APhA was not established. It is not disputed, however, that each of these developments was entirely consonant with APhA objectives; and it may be fairly inferred from all the evidence that the actions of

APhA and its collaborators were at least indirectly responsible for some of the above-mentioned effects.

## VI. *APhA's Enlistment of Third Parties in Opposition to Mail Order Pharmacies*

APhA also attempted to enlist the aid of other organizations to act against mail order pharmacies. In 1960, for example, APhA, acting jointly with the National Association of Retail Druggists ("NARD"), persuaded the American Medical Association ("AMA") to adopt a resolution calling upon doctors to encourage their patients, except in rural sections, not to use mail order prescription services. Liaison with organized medicine was continued thereafter and APhA asked its members to write articles for local medical journals decrying the use of mail service pharmacies.

APhA also urged pharmacy students in all accredited schools to avoid employment in mail order pharmacies and took steps to inculcate students with its Code of Ethics.

### A. *The Co-Conspirators*

A principal effort of APhA has been to unify all aspects of pharmacy retailing so that the pharmacy industry would, as APhA describes it, speak with one voice. A number of organizations also opposed mail order sale of prescription drugs. Generally speaking, Federal has claimed that all such organizations should be considered co-conspirators. It is clear that APhA sought to persuade others, like AMA, to its point of view, but proof of conspiracy requires more than this. APhA's actions were primarily economically motivated and were consciously designed to inhibit or prevent mail order competition for

the benefit of its pharmacist members. Only those organizations or individuals shown by the proof to have supported or collaborated with APhA for this purpose can be said to have joined knowingly to further the objects of the conspiracy alleged. *See United States v. Parke, Davis & Co.*, 362 U.S. 29, 44-45, 80 S.Ct. 503, 512, 4 L.Ed.2d. 505 (1960); *Kiefer-Stewart Co., v. Joseph E. Seagram & Sons, Inc.* 340 U.S. 211, 213, 71 S.Ct. 259, 260, 95 L.Ed. 219 (1951); *Interstate Circuit, Inc. v. United States,* 306 U.S. 208, 226-27, 59 S.Ct. 467, 474, 83, L.Ed. 610 (1939).

*State associations* of APhA were all shown to be co-conspirators. Each state pharmaceutical association "recognized" by APhA has a right to designate two voting delegates to the APhA House of Delegates. By vote in that House the states collectively have been the moving force in the adoption of the restrictions complained of in this case. They have authorized the dissemination and effectuation of these anticompetitive and exclusionary policies through APhA publications and APhA methods of enforcement. The chief administrative officials or executives of all state pharmaceutical associations constitute what is known as "NCSPAE" which meets annually and which co-sponsored the 1960 Conference that resolved to oppose mail order pharmacies. Furthermore, 17 state pharmaceutical associations at the time of the filing of this action have had compulsory dual membership agreements whereby all applicants for state association membership are required to abide by the APhA Code of Ethics and usually to become APhA members. Such state associations are said to be "affiliated" with APhA. The earliest such affiliation was in 1962 (Michigan). Iowa became affiliated as early as 1964. In Iowa, out of 1,600 practicing pharmacists, 1,000 are members of the state pharmaceutical association, of which 600 are members of APhA.

Affiliated state associations play an even larger part in the determination of APhA policies. Such states are given one voting delegate in the House of Delegates for each 200 APhA member pharmacists residing in the state. Affiliated states act to further APhA objectives, receive special materials written by the APhA staff for republication in local pharmaceutical journals, and their chief administrative officials are not only members of NCSPAE but are part of an affiliated administrative group ("NCASPAE") that meets separately with APhA officials on an annual basis at APhA headquarters in Washington, D.C.

*NABP* was also a co-conspirator. NABP, a private organization, is managed by an Executive Committee consisting of NABP officers, the immediate past president, and three elected members who direct the Association's executive director-secretary and staff. NABP membership consists of the present and former members of the respective boards of pharmacy of each of the states and territories of the United States and four Canadian provinces. In at least 14 states, such board members were required by state law to be selected from the membership of the corresponding state association of state pharmacists. In many other states, such board members were required to be selected by the respective state governors from lists prepared by the local state pharmaceutical association. Such boards of pharmacy control the licensing of all pharmacies and pharmacists in their states and have the authority to issue regulations governing pharmacists' practice. A majority of the NABP members own or operate local pharmacies. Until 1974, NABP by charter requirement convened annually at the same time and location as the APhA convention.

NABP has assisted APhA directly in the effectuation of its policies against mail order distribution and prescription drug advertising. NABP was aware of APhA's economic objectives. NABP cooperated with APhA in setting up an industry meeting in January, 1960, to determine what steps should be taken to oppose mail order drug distribution. Representatives from a number of state boards were present at the meeting at which time all state boards were asked to use every legal method to oppose the establishment of mail order houses. In 1962, APhA reported that 16 states boards had responded to its plea by issuing cease-and-desist orders to mail order houses. NABP thereafter adopted resolutions opposing mail order drug distribution and drug advertising and sent copies of these to all of its members. APhA materials opposing mail order pharmacy and drug advertising were sent to NABP and republished by the latter to its members.

*ACA* was also a co-conspirator. ACA is a national association whose membership consists of owners of pharmacies that engage only in the dispensing of prescription drugs and the sale of over-the-counter drugs, medical devices, and health-related items. Within the period from 1960 to 1976, ACA was an affiliated national organization with APhA and was therefore entitled to appoint representatives to its House of Delegates. In or about 1960, ACA joined with APhA in opposing the distribution of prescription by drugs by mail.

*Apple,* the chief executive officer of APhA was also a co-conspirator. He spearheaded APhA's opposition to mail order sales and was a vigorous opponent of mail order pharmacies. He travelled throughout the country to make speeches on behalf of APhA, and wrote numerous articles in which he constantly attacked mail order pharmacies and

emphasized the need to uphold the Code of Ethics and rulings of the Judicial Board. Mail order prescription was pictured as a "scheme" that threatened to destroy community pharmacy service. Pharmacists were told they were fighting for economic survival and the opportunity to earn a living. Price-cutting was said to be a gimmick for conning the public. Advertising was described as professionally improper. Pharmacists were urged to alert physicians and regulatory officials as well as other pharmacists to the danger perceived. In this fashion, with the aid of APhA's publications, Apple largely succeeded in uniting the profession to a concerted opposition to mail order pharmacies.

*The Iowa Board of Pharmacy* and its members were coconspirators. The actions taken by the Board in collaboration with the Iowa Association against Federal followed APhA's action proposals and were taken to further APhA's objectives, often without regard to the requirements of Iowa law.

Until a recent change in state law, all Iowa Board members were required to be selected from a list prepared by the Iowa Association and sent to the Iowa governor and were in fact Association members. The Association adopted the APhA Code of Ethics as its own, republished interpretive opinions of the Judicial Board and circulated them to all of its members whether or not members of APhA. It also submittted questions to APhA's Judicial Board for further interpretations of the Code of Ethics, established a Grievance Committee to enforce compliance with the Code of Ethics and called on the Missouri Board of Pharmacy to take action against Getz Prescription Company, a mail order pharmacy, to prevent its filling prescriptions from Iowa residents. The Iowa Board

members were members of NABP which, as indicated, took actions against Federal.

In 1962 the members of the Iowa Board of Pharmacy were reluctant to issue an original pharmacy license to Federal and only granted it in 1963 after the Attorney General of that state informed the Board that no state law existed which would prevent the issuance of a pharmacy license to a mail order house. The Iowa Board, in addition to impeding the original issuance of Federal's pharmacy license, delayed the granting to Federal of a change of address license in 1964 and withheld its annual relicensing in 1970. The Board attempted to seize Federal's stock of drugs, imposed unusual and burdensome inspection conditions on it, and cooperated with the Iowa Pharmaceutical Association and the Nebraska Pharmaceutical Association in preparing forged prescriptions which were then sent to and filled by Federal. On the basis of these filled prescriptions the Iowa Board revoked Federal's pharmacy license, forcing it to turn to the Iowa courts to compel its license to be restored. Subsequently, the members of the Iowa Board of Pharmacy arranged for the state to bring suit against Federal to prevent its filling out-of-state prescriptions, and administratively denied Federal the right to employ pharmacist interns because of its non-membership in the Iowa Pharmaceutical Association. Although the possible protected status of some of these activities is discussed below,[2] it is clear that collectively they constituted a course of conduct which adversely affected Federal's business.

All of the above co-conspirators acted primarily if not exclusively for economic anti-competitive reasons. Any

[2] *See* p. 1209 *infra*, discussing applicability of the *Noerr* doctrine to the activities of the Iowa Board.

proffered explanations addressing substantial public health or safety concerns were not adequately supported by the evidence, either as to the validity or sincerity of the concerns expressed.

Federal also claims that other state boards of pharmacy in addition to the Iowa Board were co-conspirators. The proof will not support this claim. Similarly the proof failed as to all others claimed to be co-conspirators.

B. *Forged Prescriptions*

All pharmacies may receive false or forged prescriptions and must take precautions to prevent filling them inadvertently. Mail order pharmacies are more removed from the prescribers and must take extra precautions. Federal did this. Its record on this score was excellent. Indeed, mail order pharmacies generally showed up better than independent pharmacies in this regard during a somewhat haphazard survey conducted in 1972.

Due to the continuing possibility that its pharmacy license might be revoked, Federal instituted procedures to assist it in identifying forgeries. These took up the time of one or two clerical employees, the cost of establishing and updating a physician signature register, telephone expense, and the organization and maintenance of a physician control drug number registry required by law enforcement authorities.

Aware of the possible vulnerability of mail order pharmacies to forgery, steps were taken by opponents of mail order to cause Federal to fill forged prescriptions.

*Arkansas:* In the spring of 1973, the Chief Inspector of the Arkansas Board of Pharmacy, working in conjunction with an Arkansas Grand Jury, submitted forged prescrip-

tions to various mail order and community pharmacies both within and without the State of Arkansas, including Federal and the AARP[3] Pharmacies in Washington, D.C., and Kansas City, Missouri. Pharmacists at Federal and AARP, among others, filled these prescriptions. As a consequence of Federal's filling the forged prescriptions, its pharmacist Rasmusen was twice arrested and jailed for the purpose of extraditing him to Arkansas, but the Governor of Iowa refused extradition. Efforts to extradite AARP pharmacists were also made without success.

Following Arkansas' attempts to extradite Rasmusen and pharmacists employed at AARP, NABP carried in its publications a report of the activities of the Arkansas Grand Jury.

*Nebraska/Iowa:* In February, 1964, Burke, a pharmacist located in Grand Isle, Nebraska, notified the Nebraska Pharmaceutical Association that Federal was soliciting mail order prescriptions in Nebraska and expresed his concern that the Iowa Board of Pharmacy would permit this type of pharmacy practice within its jurisdiction. This letter was forwarded to the Iowa Pharmaceutical Association, which advised Burke of the activities undertaken by the Iowa Board with respect to Federal. The Iowa Association suggested that Burke seek a cease-and-desist order from the Nebraska Board of Pharmacy.

In further correspondence with Burke the Iowa Association suggested that he arrange to have a bogus prescription

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[3]The mail order prescription drug service that operates for the exclusive benefit of the American Association of Retired Persons ("AARP") and the National Retired Teachers Association has been in operation at all times relevant to this lawsuit.

written by a practicing physician and sent to Federal, and that he might have a teenager write a forged prescription and send it to Federal to see if it would be filled. Thereafter, the prescriptions were prepared and sent as suggested, and were filled by Federal. All of the information was forwarded to the Iowa Association by Burke. The Iowa Association submitted this information to the Iowa Board with a request that it take enforcement action.

On the basis of the information obtained from Burke, and other information available to the Iowa Board regarding allegations of false and deceptive advertising by Federal, the Iowa Board initiated proceedings in late 1964 or early 1965 to revoke Federal's retail pharmacy license, and thereafter it did so. Federal, while continuing its business, filed suit in the Iowa state court to require the Pharmacy Board to reinstate its license. It prevailed, and on November 10, 1965, the state court issued a decree, annulling the revocation of Federal's license, but warning Federal to cease using false advertising and to use greater care in its efforts to detect forged prescriptions.

Dr. Linwood F. Tice, President-elect of APhA and Dean of the Philadelphia College of Pharmacy and Science testified as a witness in the Iowa state court proceeding on behalf of the Iowa Board.

C. *The Massachusetts Suit*

It was possible for some states with restrictive laws to obtain cease-and-desist orders *ex parte* against Federal and other mail order concerns. Although 15 states issued such orders and they were widely publicized by APhA, the orders were ignored. Mail order sales and advertising by out-of-state mail order concerns continued into cease-and-desist order states.

APhA prepared an extensive legal brief in 1965 and early 1966, proposing various legal theories that might be urged to provide more effective opposition to mail order pharmacies. Such theories were then presented by APhA to a meeting of the NABP Board Secretaries, and NABP published the brief in its proceedings, sending it to all boards. In addition, APhA circulated the brief to the state associations.

In December, 1967, the Massachusetts Pharmaceutical Association and five member pharmacists practicing in Massachusetts filed suit in Massachusetts state court against Federal and later obtained a declaratory judgment to the effect that Federal's mail order activities constituted the practice of pharmacy in Massachusetts without complying with Massachusetts licensing laws. Massachusetts prescriptions were being filled by a pharmacist from Iowa who was not licensed in the state. Thereafter, these plaintiffs obtained an injunction against Federal directing it to cease its business activities in Massachusetts unless it properly registered under Massachusetts law. Neither the declaratory judgment nor the subsequent injunction was contested by Federal, which did not appear in the Massachusetts proceedings.

The Massachusetts Association requested that APhA provide funds for the purpose of taking the Massachusetts judgment to Iowa under the "Full Faith and Credit Clause" for enforcement in Iowa. APhA agreed to do so.

In the interim, the Director of APhA's Legal Division sent a request to approximately 14 state associations requesting that they meet to discuss the action by the Massachusetts Association. A meeting was finally arranged and held in Kansas City, Missouri, in October, 1968.

Approximately four attorneys attended, including a representative of the Iowa Association.

NABP noted in its minutes that its staff was to give support to the Massachusetts Pharmaceutical Association suits against Federal in the Iowa courts, even though NABP knew at the time that the Massachusetts suit was solely economic in character and had been instituted primarily for the purpose of eliminating Federal's price competition with the Massachusetts Association members.

Following APhA's agreement to cover legal fees and expenses, counsel for the Massachusetts plaintiffs brought the case to Iowa by filing a complaint in the United States District Court for the Southern District of Iowa. The firm serving as local counsel for plaintiffs was paid by APhA.

The federal court dismissed the action in July, 1969, holding that the Massachusetts plaintiffs could not establish the necessary jurisdictional amount to maintain their action in federal court. The plaintiffs appealed and the Eight Circuit affirmed the lower court in an opinon issued in 1970.

The Massachusetts plaintiffs then filed their complaint in the Iowa State Court at Boone County, Iowa. Following at least one change of judge and a hearing on the merits, the state court in June, 1977, issued a decision refusing to enforce the Massachusetts injunction.

After a review of the decree in 1977, and consultation with counsel, the Massachusetts plaintiffs and APhA determined not to pursue the case further.

VII. *Liability*

Practices challenged by Federal directly affected the commerce between the states in prescription drugs. *See Northern Cal. Pharmaceutical Assn. v. United States,* 306 F.2d 379, 386-87 (9th Cir.), *cert. denied,* 371 U.S. 862, 83 S.Ct. 119, 9 L.Ed.2d 99 (1962); *United States v. Utah Pharmaceutical Assn.,* 201 F.Supp. 29, 33 (D. Utah), *aff'd,* 371 U.S. 24, 83 S.Ct. 119, 9 L.Ed.2d 96 (1962). The proof clearly shows a group boycott arranged primarily for economic anticompetitive reasons among conspirators with sufficient power and influence in the market to make it effective. In addition to general opposition to mail order pharmacies the boycott was specifically directed against Federal. The conduct of APhA and its co-conspirators had the intended and necessary effect of excluding or impeding Federal and other mail order pharmacies from access to retail customers. Such conduct, as delineated by the findings, constituted a *per se* violation of Section 1 of the Sherman Act. *United States v. General Motors Corp.,* 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966); *Klor's, Inv. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959); *Associated Press v. United States,* 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945); *Fashion Originator's Guild of America, Inc. v. FTC,* 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941). *See also National Society of Professional Engineers v. United States,* 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976).

Elements of the boycott also were prohibited by the Act, given the factual circumstances in which they arose. These prohibited elements include the ban on advertising during most of the relevant period, *see National Society of Pro-*

*fessional Engineers v. United States, supra,* 435 U.S. at 692-96, 98 S.Ct. at 1365-67; *Gough v. Rossmoor Corp.,* 487 F.2d 373, 376 (9th Cir. 1973); *United States v. National Funeral Directors Assn.,* 1968 Trade Reg.Rep.(CCH) ¶ 72,529, (E.D. Wis. 1968) (Consent Decree), the concerted opposition to discounting, *see United States v. General Motors Corp., supra,* 384 U.S. at 144-47, 86 S.Ct. at 1330-31; *United States v. Parke, Davis & Co.,* 362 U.S. 29, 45-47; 80 S.Ct. 503, 512-513, 4 L.Ed.2d 505 (1960), and the restrictive applications of the Code of Ethics affecting non-members as well as members, *see National Society of Professional Engineers, supra,* 435 U.S. at 692-96, 98 S.Ct. at 1365-67; *United Mine Workers v. Pennington,* 381 U.S. 657, 668, 85 S.Ct. 1585, 1592, 14 L.Ed.2d 626 (1965); *Mardirosian v. American Institute of Architects,* 474 F.Supp. 628, 647 (D.D.C. 1979).

From the outset APhA has urged that most if not all of its activities fall outside the strictures of the Act because they were protected by the First Amendment to the Constitution. This defense brings into focus the doctrine first announced by the Supreme Court in *Eastern Railroad Presidents Conference v. Noerr Motor Fright, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) ("Noerr"). The Court reviewed *Noerr* and its progeny in the context of this case in an earlier summary judgment proceeding. *See Federal Prescription Service, Inc., v. American Pharmaceutical Assn.,* 471 F.Supp. 126 (D.D.C. 1979). That discussion of the *Noerr* doctrine is incorporated herein by reference.

APhA's claim for blanket immunity under *Noerr* is far too broad. The events reviewed above regarding opposition to advertising and discount pricing and implementation of the Code of Ethics do not come under the

protection of *Noerr*. These activities, undertaken purely among private entities such as defendant and other trade associations, fail to implicate First Amendment concerns. *See National Society of Professsional Engineers v. United States, supra,* 435 U.S. at 697-99, 98 S.Ct. at 1368-69. Nor does Federal's attack on these efforts to influence or control private, non-governmental conduct in any way impinge upon APhA's right to seek redress before legislative bodies, governmental agencies or courts.

It should be noted that APhA and its co-conspirators did engage in legislative efforts to thwart mail order pharmacies at both the federal and state levels. In addition, they urged Federal Government agencies to enforce existing regulations in the hope that such enforcement would limit mail order business. The nature and extent of these activities are not shown on the record. As far as appears they were not sham. No illegal lobbying practices or other misuses of the legislative or administrative processes have been demonstrated. The Court considers these activities fully protected by the *Noerr* doctrine.

Certain conduct found in the record, however, notably the state licensing and regulatory proceedings in Iowa, the forged prescription actions initiated in Arkansas and Nebraska, and the Massachusetts-Iowa litigation, raises serious issues under the *Noerr* doctrine. Because plaintiffs cannot recover for damages resulting from genuine *Noerr* protected conduct even if undertaken by a co-conspirator, these *Noerr* issues require analysis before turning to plaintiff's damage claims.

Under the *Noerr* doctrine, genuine individual or concerted action undertaken before legislative bodies, administrative agencies or courts is absolutely immune from antitrust liability. *See United Mine Workers v. Penn-*

*ington,* 381 U.S. 657, 669-70, 85 S.Ct. 1585, 1593, 14 L.Ed.2d 626 (1965); *Noerr, supra,* 365 U.S. at 136-38, 81 S.Ct. at 529-30. The "genuine" quality of the challenged activity is not automatically impugned by evidence that defendant's ultimate or exclusive intent is to restrain competition or that an identifiable result of defendant's conduct is injury to plaintiff's business. *Id.* at 138-44, 81 S.Ct. at 530-33. In limited circumstances, however, a competitor's political or litigative activities may cease to be protected as genuine but instead become identified as a "sham." *See Otter Tail Power Co. v. United States,* 410 U.S. 366, 379-80, 93 S.Ct. 1022, 1030-31, 35 L.Ed.2d 359 (1973); *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 511-15, 92 S.Ct. 609, 612-14, 30 L.Ed.2d 642 (1972). Such activities constitute a sham if undertaken with the intent either to bar another competitor from having meaningful access to the relevant governmental body or to abuse the processes by which that governmental body functions. *See, Id.,* at 512-15, 92 S.Ct. at 612-14.

The Massachusetts-Iowa litigation is clearly entitled to *Noerr* protection. Filed in 1967 to enforce rights under extant state law, the action was prosecuted openly in two states. There can be no showing that the claim was baseless or frivolous; indeed the state association was initially successful in state court under Massachusetts licensing laws. Any subsequent invalidation of these or analogous laws is irrelevant. Defendants are not required to anticipate future judicial rulings with respect to such existing laws; to decide otherwise would surely chill the First Amendment rights protected by the *Noerr* doctrine. See *Subscription Television, Inc.* v. *Southern Cal. Theatre Owners Assn.,* 576 F.2d 230, 233-34 (9th Cir. 1978). If APhA had lobbied for the enforcement of licensing laws it knew to be invalid

or unenforceable, its conduct might be dismissed as sham. But there has been no showing that in pursuing this litigation defendant or its co-conspirators engaged in such unethical practices or in any way abused the judicial process. Nor were plaintiffs denied meaningful access to the appropriate judicial forums; the fact that Federal litigated actively and eventually prevailed in both the state and federal courts of Iowa belies any notion that access was barred.

The submission of forged prescriptions in Arkansas is not attributable to APhA or any of its co-conspirators. Without addressing the "genuineness" of the action taken by the Arkansas grand jury, the evidence presented was not sufficient to link the Arkansas Board or its Chief Inspector, or any other participant in the Arkansas forgery operation, to the conspiracy. NABP's subsequent publicization of the indictment and arrests is not significant in this context. Accordingly, there can be no recovery for expenses incurred as a result of this effort.

The activities undertaken by and before the Iowa Board have been described in some detail. After carefully reviewing the entire course of conduct, the Court concludes that these activities must be viewed not as individual, isolated events but rather as a persistent, substantial and coherent practice. The licensing delays, the revocation action taken following the Nebraska forged prescriptions, the effective prohibition on employing pharmacist interns, the attempted seizure of Federal's inventory, and the burdensome inspection conditions imposed were all part of a concerted effort to harass Federal, to disrupt and interfere with its pharmacy practice and to eliminate it as a competitor.

The state agency that sanctioned or initiated these anti-competitive activities had, through its membership, consistently expressed economic allegiance to APhA and opposition to mail order. The conduct of board members, as administrative officials responding to private initiatives, is subject to closer scrutiny under the *Noerr* doctrine than that of state legislators. *See California Motor Transport Co. v. Trucking Unlimited, supra,* 404 U.S. at 512-13, 92 S.Ct. at 612-13; *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 707-08, 82 S.Ct. 1404, 1414-15, 8 L.Ed.2d 777 (1962). This conduct is also less protected where, as here, the focus of administrative decision-making shifts from general policy concerns toward particular, discretionary judgments responsive to commercial considerations. *See generally George R. whitten, Jr., Inc. v. Paddock Pool Builders, Inc.,* 424 F.2d 25 (1st Cir.), cert. denied, 400 U.S. 850, 91 S.Ct. 54, 27 L.Ed.2d 88 (1970); *In re Airport Car Rental Antitrust Litigation,* 474 F.Supp. 1072 (N.D.Cal. 1979). Because the Iowa Board was itself a part of the illegal conspiracy its administrative processes could not be invoked or applied fairly or impartially with respect to Federal's business. Instead, these processes were abused by APhA, the state associations of Iowa and Nebraska, and by Board members themselves; as a consequence the challenged Board action is tainted as a sham. *See California Motor Transport Co. v. Trucking Unlimited, supra,* 404 U.S. at 513, 92 S.Ct. at 613; *Israel v. Baxter Laboratories, Inc.,* 151 U.S. App. D.C. 101, 107, 466 F.2d 272, 278 (D.C.Cir. 1972); *In re Airport Car Rental Antitrust Litigation, supra,* 474 F.Supp. at 1087, 1091-92; *United States v. Otter Tail Power Co.,* 360 F.Supp. 451 (D.Minn. 1973), *aff'd,* 417 U.S. 901, 94 S.Ct. 2594, 41 L.Ed.2d 207 (1974).

## VII. *Damages*

Viewing the conduct of APhA and its co-conspirators as a whole after eliminating *Noerr*-protected conduct, it is clear that Federal's sales were inhibited and its profits accordingly affected. The task remains to determine the extent of the business injuries suffered by Federal and to address the claims of the three individual plaintiffs.

### A. *Statute of Limitations*

The four-year limitation period that governs recovery in this case, *see* 15 U.S.C. § 15b, has been tolled pursuant to 15 U.S.C. § 16(b) by *United States v. American Pharmaceutical Assn.*, No. 75-558 (E.D. Mich., filed Nov. 24, 1975). Thus the applicable statutory period runs from November 24, 1971. Because the proof shows that Federal was well aware of the antitrust implications and continuing damages resulting from APhA's widely publicized conduct, and it could have reasonably estimated the then-present amount of those damages immediately on the basis of relevant data available at the time, plaintiffs cannot recover for damages suffered prior to November 24, 1971.

Given the continuing nature of the conspiracy, however, the amount and nature of damages accruing after that date were speculative and unprovable as of November 24, 1971. The effects on Federal's sales and profits from restrictions on advertising, the Code of Ethics, and the Iowa Board's antagonistic licensing efforts endured well beyond 1971. Neither the continuing impact of some of these activities nor the threat that others might recur could be assigned an estimated value beyond mere guesswork at that time. Such damages became reasonably ascertainable only after the 1971 date, and plaintiffs can recover for them here. *Zenith*

*Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338-42, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971); *AMF, Inc. v. General Motors Corp.*, 591 F.2d. 68, 72-73 (9th Cir.), *cert. denied*, ____U.S.____, 100 S.Ct. 210, 62 L.Ed.2d 136 (1979); *Ansul Co. v. Uniroyal, Inc.*, 448 F.2d 872, 884-85 (2d Cir. 1971), *cert. denied*, 404 U.S. 1018, 92 S.Ct. 680, 30 L.Ed.2d 666 (1972).

B. *Lost Profits*

Federal's principal claim is for lost profits. As far as this claim is concerned, there were many factors that adversely affected the company's performance during the relevant period. It was hampered substantially by state laws and regulations, by the Massachusetts-Iowa litigation, by labor difficulties, by the spectacular growth of chains, and by the success of its rival, AARP. Except for certain activities of the Iowa Board of Pharmacy that occurred and affected Federal mainly prior to 1972, APhA cannot be held responsible for these obstacles.

On the other hand, the opposition of APhA and its co-conspirators to mail order advertising and the enforcement of APhA's Code of Ethics also had an adverse effect on Federal's sales and profits. There is no acceptable computation in the record measuring this effect with any certainty and concrete proof of damages is wholly missing. Much must therefore be left to "just and reasonable estimate," based largely on legitimate inference. *See Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1946); *Columbia Pictures Indus., Inc. v. American Broadcasting Cos.*, 501 F.2d 894, 898, (2d Cir. 1974).

For example, with respect to the opposition to advertising the proof shows that in 1960-61, before Federal was even in business, APhA sought to prevent mail order advertising in *Life* and *Newsweek* magazines. *Life* did not

agree and *Newsweek* indicated it had already decided not to publish. Subsequently, in eight instances, advertising proposals submitted by Federal to *Eagle Magazine, Grier's Almanac, Reader's Digest, New York Daily News, Alive & Well, Farm Journal, Iowa Farm Bureau Spokesman* and *The Farmer* were apparently rejected. There is no proof that direct intervention by APhA or any co-conspirator was responsible for these business decisions, although it may be inferred that the general campaign of APhA had some indirect effect upon some of these and upon other advertisers. However, Federal was soon primarily interested in advertising only in publications of organizations willing to sponsor its services and for practical purposes abandoned efforts to advertise in publications of general circulation. Moreover, many organizations had valid reasons independent of APhA's campaign for refusing to sponsor Federal.

As of 1974 there were 24 states that prohibited the advertising of actual prices for prescription drugs, 12 by statute and 12 by regulation. Although agitation by pharmacists undoubtedly encouraged such legislation, some was of long standing and in no case was it shown that these requirements were due to specific activities of APhA or any co-conspirator. In any event, absent proof of sham, these activities as indicated were protected by *Noerr*. Further, it must be noted that many other states had no such ban.

Federal was in fact able to continue to advertise even in states where such advertising was prohibited by law. However, Federal felt the need to exercise restraint in view of the concerted opposition it faced from pharmacists and state officials to its methods of doing business. Thus Federal, in consultation with its advertising agency, tended to avoid forms of advertising that would unduly emphasize its price-cutting schedule and to this extent the conspiracy must be held partially responsible.

Because APhA's opposition to advertising, discounting, and mail order was well known and its collaboration with related groups has been established, activities of the conspiracy undoubtedly had a negative effect on Federal's sales, at least in many states. But it must be kept in mind that legislation, litigation and other factors also impaired Federal's sales and to this extent APhA for reasons already indicated cannot be held responsible in damages.

Confronted with these difficulties of proof, Federal attempted to construct a model through the testimony of a market economist. In this fashion plaintiff attempted to demonstrate what Federal's sales and profits would have been in an economic environment free from all the market intervention of which it complains. This proof was unacceptable and unconvincing. Plaintiff's expert assumed the same market intervention was attributable to APhA nationwide, but in some states this had not occurred at all or was of limited effect. He assumed that APhA was responsible in damages for all legislation and regulatory opposition to mail order pharmacies. Similarly, he made no allowance for the Massachusetts litigation or other *Noerr*-protected activity. He failed to adjust for the 15 percent to 30 percent of Federal's sales made over-the-counter and outside the confines of this case. He projected a wholly unupported compound growth rate derived in part from an analysis of sales by AARP which were not comparable due to special favorable conditions supporting that organization's business. He made no effort to present proof confined to the effect of overt acts during the post-November 24, 1971, period. He used for projection an unrealistic rate of return unrelated to Federal's own experience or that of other sellers of prescription drugs. Plaintiff's experts was biased. No reliance can be placed on

his computations purporting to show loss of past or future profits.

Being wholly unaided by Federal's damage proof, the Court must inquire whether the record otherwise contains sufficient proof to enable the Court to determine damage with reasonable certainty so as to make an award. Obviously the Court cannot resort to pure speculation but the decisions teach that an injured antitrust plaintiff should not be entirely frustrated in its efforts at compensation once, as here, the proof establishes both a violation of the antitrust laws and injury. *See, e.g., Bigelow v. RKO Radio Pictures, Inc., supra; Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931); *Poster Exchange, Inc. v. National Screen Service Corp.*, 431 F.2d 334 (5th Cir. 1970), *cert. denied*, 401 U.S. 912, 91 S.Ct. 880, 27 L.Ed.2d 811 (1971).

As already indicated, Federal's lack of success was not due entirely to the unlawful conduct of APhA and its co-conspirators. Thus the question is presented as to how APhA's responsibility for Federal's sales and profit performance can be differentiated from other inhibiting factors in the marketplace for which APhA and its co-conspirators cannot be held legally responsible.

There is no comparable concern whose sales may be used as a guide. Neither the experience of the chains nor of the independents is analogous in the sense that Federal's experience, absent illegal restraint, would have corresponded to their sales progress. There is no showing that these other two classes of merchandisers depended on substantial advertising or price discounting. Their sales grew along with general growth of prescription drug sales, but at differing rates and undoubtedly due to distinct factors related to customer convenience and buying patterns.

In contrast, AARP, another mail order prescription seller, grew rapidly and profitably at least partly because it sold only to members of a large association of retired persons with which it was closely affiliated. This rapid growth was achieved even though AARP faced the same opposition from APhA and its co-conspirators. In short, it is impossible to place Federal's experience against any industry standard. The market was definitely expanding during the relevant period, but it cannot be determined what share of that market Federal would have attracted absent the illegal activities previously described.

Because Federal never operated free of illegal restraints, there is no period of unrestrained growth to be contrasted with the relevant period. The mail order prescription business found initial acceptance in the 1960's when attitudes toward drug pricing in the wake of the Kefauver investigations led the public to look for cheaper alternative sources of supply. These conditions had changed substantially by 1972 and there is no basis for assuming that early gains would have held. Public attitudes shifted and the effect of the conspiracy perceptibly weakened. By the present, the effects of the conspiracy have largely dissipated in the wake of unrelated lawful developments within the industry, and those companies still in the mail order prescription business realize that future prospects have dimmed. The business has been unattractive for some years, given new pricing and merchandising practices and altered public attitudes.

In spite of these factors, which militate against a recovery anywhere near the figure demanded by plaintiffs, the Court is satisfied that Federal lost profits during the relevant period due to defendant's illegal activities. Federal's sales and expenses are summarized by schedules in evidence showing its actual results, year-by-year, based

on certified financial statements. These, plus the overall experience of the prescription drug industry and the limited proof of the actual effect of the conspirator's illegal activities, must be weighed to arrive at an informed approximation of Federal's recoverable loss. It therefore becomes necessary to make a reasonable estimate based on relevant data.

From 1972 through 1977, the six-year damage period under review, dollar sales by independents steadily grew from approximately eight and one-half billion dollars to approximately eleven billion dollars, an increase of about 30 percent. Chains and the captive mail order business of AARP grew in the same period at even faster rates. The dollar volume of sales for the chains during the relevant six-year period increased by more than 80 percent to an annual total of almost twelve billion dollars. Federal's largest sales were in 1971. Thereafter its sales steadily declined each year from $1,619,094 in 1972 to $1,138,455 in 1977. During this period Federal's operations at best earned only a marginal profit and the concern actually showed a loss in the two last years.

In order to determine Federal's lost profits attributable to the conspiracy in the period, it is necessary to estimate what its sales might have been had the conspiracy not been in effect. Although Federal argues for an explosive growth rate, equal to or beyond that of the chains, in fact Federal's sales were virtually static for the eleven-year audited period through 1977. Moreover, as previously discussed, many important obstacles to Federal's growth cannot be attributed to the conspiracy. Balancing all the factors in the case, and allowing for the continuing effects of events attributed to the conspiracy in earlier years, the Court has determined that Federal's sales during the six-year period would at best have cumulatively amounted to

an additional $2,800,000 had the conspiracy not been in effect, or roughly one-third more each year.

It must then be determined what profits Federal was likely to have earned on this additional business. The company's records over the entire period from 1964-77 conclusively demonstrate that there was never any definite correlations between profits and sales volume. Thus in 1966 it had net income of $38,464, while on an almost identical volume it showed a loss of $62,014 in 1977. Its percentage of net income to sales varied markedly each year, never surpassing 3.30 percent; the record contains no explanation for the variations shown.

It is therefore also necessary to estimate the appropriate percentage of net income to sales, *i.e.*, profits, which it is reasonably likely that the company would have earned on the additional business. Allowing for the fact that Federal's expenses were inordinately high in the 1970's, due in part to labor difficulties and substantial litigation expense, and reviewing the company's experience for the entire period that data are available, it appears reasonable to assume that Federal would have earned one percent on sales in the period 1972-77. Although one percent on sales is a low rate of profit for the retail drug industry, it exceeds the rate actually earned by Federal for any of the relevant six years. Applying this percentage, Federal's profits would have been increased and its losses reduced in this period by $28,000. There is not sufficient information available in the record to support a more precise year-by-year calculation and no effort is made to develop profits on a cumulative basis. The estimates of business lost and profits to be gained are generous to allow in part at least for this factor.

No basis exists for finding any loss of future profits. Mail order prescription sales have flattened out. There

is no proof that Federal's business will be more than marginally profitable in the future. Its emphasis upon developing third-party payment plans has not been successful and its general method of doing business is less attractive than in the past due to the chains and other factors. The chain drug store segment of the prescription sales business is the most rapidly growing segment of the retail prescription drug market. Chain drug stores can offer the convenience of one-stop shopping by combining a pharmacy operation with a larger retail establishment. Chains have become accessible to more and more customers as a result of shopping centers. Although the illegality of APhA's opposition to advertising has been apparent in recent years and its efforts to block mail order pharmacies have changed and lessened, no corresponding growth has occurred at Federal. Its losses have appeared and grown. A claim based on loss of future profit is completely speculative.

The claim that Federal was required to incur extra, precautionary expense to avoid filling forged prescriptions attributable to the conspiracy was supported by persuasive proof only as to the Iowa Board's revocation proceeding. Even here, it must be noted that mail order concerns are particulary vulnerable to forgery attempts and sound business practice requires them to take special precautions. Such forgeries generally did not originate with the conspiracy. Moreover, the extra expense of checking for forgeries following the 1965 revocation proceeding had largely dissipated by 1971. Federal is entitled to $6,000 for such additional "checking" costs over the relevant six-year period.

Some of Federal's other claims for damages lack sufficient specificity and are speculative. It is claimed without

concrete proof that members of Federal's management were diverted by court and administrative appearances and time spent preparing exhibits. Even ignoring problems of proof, to the extent these activities were attributable to the conspiracy and outside the protection of *Noerr* they are compensated by the award of lost profits. Finally, it is claimed that $112,849 was expended defending actions and opposing legislation. The bulk of this relates to the Massachusetts suit and cannot be recovered. There is no demonstration of other expenses in the relevant period directly attributable to non-protected conspiracy activity.

C. *Individual Damage Claims*

Plaintiffs Sandahl, Johann and Rasmusen, the owners of Federal each claim $75,000 individually, for damages incurred over a 15-year period. Sandahl says that he was injured in his individual business and property by reason of the defendant's activities in the amount of $5,000 per year, or $75,000 for the entire period from 1963-1977. The only evidence in the record relating to this claim is sketchy. He claimed that he was required to make trips (at Federal's expense) and to take time away from Federal's management (for which time he was compensated by Federal). He also testified that his personal line of credit had been subjected to greater scrutiny by lenders and that a greater percentage of collateral had been required on loans to him or to Federal which he cosigned. He also claimed that he had twice been refused a loan, once for another of his enterprises. (Federal Vitamin Service) and once for a loan to him personally. None of these matters was adequately particularized. There was no proof that he was unable to obtain loans from other banks, or that his inability to obtain financing on these two occasions had any impact whatsoever upon his personal

business or property. Undoubtedly his association with a business that was receiving criticism from authorities in many states because it failed to comply with state laws and regulations hurt him but, in large part, these are the hazards of doing business in a highly regulated industry and cannot be legally attributed to APhA in this case.

Johann claimed that, because of the alleged conspiracy, he had to spend time preparing materials in connection with various legal proceedings. He was fully compensated by Federal for this time and therefore suffered no injury to his business or property as a consequence. He also claimed as injury the reduction in the value of this stock ownership interest in Federal that allegedly resulted from the challenged conspiracy. There is no evidence from which the finder of fact could make a just and reasonable estimate of the amount of the claimed reduction in value, if any. There was no claim that he had been injured in his business or property in any other way.

Johann also seeks compensation for injury to his name and reputation. In this regard, the only evidence of record is that his connection with Federal had been the subject of unspecified newspaper reports and comments.

The only evidence offered in support of Rasmusen's claim had nothing to do with his personal business or property. Instead, it involved claims that, as a result of his two arrests and the attendant publicity received, he had a problem with his children, and he had to change his family's social life to avoid social contact with pharmacists. These arrests are not attributable to the conspiracy. Moreover, this type of injury to a person's private affairs, unrelated to business considerations, is not recoverable under the antitrust laws. *See generally, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-88. 97

S.Ct. 690, 696-97, 50 L.Ed.2d 701 (1977); *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390, 398-99, 27 S.Ct. 65, 66-67, 51 L.Ed. 241 (1906).

No cognizable damages were proven by any of the individual plaintiffs.

All damages awarded must be trebled according to statute. Accordingly, Federal is awarded $102,000, plus reasonable costs and attorney's fees. A form of judgment is attached.

## APPENDIX D

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|---|---|---|
| FEDERAL PRESCRIPTION SERVICE, INC., et al., Plaintiffs, | ) | |
| v. | ) | Civil Action No. 77-1163 |
| AMERICAN PHARMACEUTICAL ASSOCIATION, Defendant. | ) | |

[Filed Feb. 14, 1980 – JAMES F. DAVEY, CLERK]

### JUDGMENT

This action having been duly tried, and this Court having filed its Findings of Fact and Conclusions of Law this 14th day of February, 1980, now therefore it is

### ORDERED, ADJUDGED AND DECREED

(1) American Pharmaceutical Association has violated Section 1 of the Sherman Act, 15 U.S.C. § 1, and its conduct has injured the business of Federal Prescription Service, Inc.

(2) Federal Prescription Service, Inc. is awarded trebled damages of $102,000, for its claims against American Pharmaceutical Association, to be paid with interest at six percent commencing one month from the date of this Judgment.

(3) Federal Prescription Service, Inc. shall also be awarded reasonable attorney's fees and costs. If agreement as to the amount of attorney's fees is not reached prompt-

ly, the matter shall be presented to the Court on papers supported by appropriate affidavits.

(4) The claims of each of the three individual plaintiffs are dismissed.

/s/ Gerhard A. Gesell
United States District Judge

February 14, 1980.

## APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| FEDERAL PRESCRIPTION SERVICE, INC., et al., | ) | |
| Plaintiffs, | ) | |
| | ) | Civil Action |
| v. | ) | No. 77-1163 |
| | ) | |
| AMERICAN PHARMACEUTICAL ASSOCIATION, | ) | |
| Defendant. | ) | |

[Filed Mar. 27, 1979 — JAMES F. DAVEY, CLERK]

### MEMORANDUM OPINION

The National Association of Retail Druggists ("NARD"), one of the defendants in this civil jury antitrust damage action, initially moved for summary judgment more than nine months ago. At that time, the Court, pursuant to Fed.R.Civ.P. 56(f), delayed its consideration of the motion so that plaintiffs could have full opportunity to perfect their claims by discovery prior to response. Plaintiffs then searched NARD's documents, deposed witnesses, and elicited answers to interrogatories. Now on the full record as explained by affidavits and after further briefs have been filed and oral argument held, the matter is ripe for decision.

The complaint filed July 6, 1977, alleges a broad conspiracy among various groups and organizations, some defendants in this action and some not, to oppose, prevent and restrain mail service sales of prescription drugs. It is

claimed that the conspiracy has "gone beyond advocacy" of the defendants' position and has involved active efforts designed to eliminate mail order competition. Paragraph 14 of the complaint sets out the alleged means of the claimed conspiracy in ten subheadings from (a) through (j).

NARD's motion for summary judgment denies any illegal agreement and urges that its admitted opposition to the sale of prescription drugs by mail never went beyond the area immunized from antitrust proscription by *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) *(Noerr). See Otter Tail Power Co. v. United States*, 410 U.S. 366, 379-80 (1973); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657, 669-70 (1965); *Subscription Television, Inc. v. Southern California Theatre Owners Association*, 576 F.2d 230 (9th Cir. 1978); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977). The *Noerr* doctrine, as developed through the later cases, protects genuine individual or concerted action before legislative bodies, administrative agencies and courts. The doctrine rests upon aspects of the First Amendment to the Constitution and provides an absolute immunity from antitrust liability so long as the activity is "genuine." The immunity applies even if the defendant's ultimate intent is to restrain competition, *see United Mine Workers* v. *Pennington, supra*, 381 U.S. at 670; *Noerr, supra*, 365 U.S. at 138-40, and even where an incidental though important effect of the defendant's conduct is to inflict "some direct injury" upon the plaintiff, such as destroying its goodwill among the public and its customers, *see Noerr, supra*, 365 U.S. at 142-44. *Noerr*-like activity, however, loses its protection when it is not "genuine" or constitutes a "sham." Such is the case when the purpose and possibly the effect

of the defendant's conduct is to bar its competitor "from meaningful access" to the relevant governmental body, *see California Motor Transport Co.* v. *Trucking Unlimited, supra,* 404 U.S. at 512-15, or is to abuse the relevant government body's processes, *see id.,* use those processes to restrain competition without any genuine intent to present one's position to the pertinent government body.

Since NARD's motion is for summary judgment, notice should be taken of the rules that properly govern the award of summary judgment in this variety of antitrust litigaton. The fact that antitrust violations are alleged does not vitiate the force of any of the normal summary judgment rules, as the Supreme Court recognized in *First National Bank* v. *Cities Service Co.,* 391 U.S. 253, 288-90 (1968). *See also Merit Motors, Inc.* v. *Chrysler Corp.,* 569 F.2d 666, 668-69 (D.C. Cir. 1977). Moreover, where, as here, the motion rests in substantial part on the *Noerr* doctrine, it is particularly important that the Court carefully scrutinize the adequacy of plaintiffs' claims. The pendency of a meritless suit touching upon *Noerr*-protected conduct can itself chill the exercise of First Amendment rights. *See Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Executive Board, supra,* 542 F.2d at 1082-84; *Wilmorite, Inc.* v. *Eagan Real Estate, Inc.,* 454 F.Supp. 1124, 1137 (N.D.N.Y. 1977), *aff'd mem.,* 578 F.2d 1372 (2d Cir. 1978), *cert. denied,* 47 U.S.L.W. 3369 (Nov. 28, 1978). Here, a substantial *Noerr* showing has been made. Thus, plaintiffs must meet the requirements of Fed.R.Civ.P. 56(e) by demonstrating specific and concrete facts that support their allegations. The Court has already permitted plaintiffs substantial and liberal discovery against NARD; the case has consequently reached such a stage that, if plaintiffs cannot meet their burden under Fed.R.Civ.P. 56(e), forcing NARD to proceed to trial would jeopardize significant constitutional rights.

At the outset, plaintiffs acknowledge, as they must, that much of NARD's activities has involved lobbying efforts before Congress and state legislatures concerning pharmacy laws, representations to and appearances before administrative agencies and contact with court proceedings. Not only are all these activities classically within the areas protected by *Noerr,* but plaintiffs have pointed to no fact which would even suggest that the activities fell within the "sham" exception to the *Noerr* doctrine. No evidence is offered showing any tactics by NARD involving opposition to or delaying of state licensing or other administrative action and NARD, by affidavit, denies any such conduct. Similarly, plaintiffs have not demonstrated a single instance where NARD has participated in the instigation of baseless and harassing litigation against the interests of mail order pharmacy. Again, NARD by affidavit denies any such participation.

Furthermore, the plaintiffs have not shown, and NARD by affidavit denies, that NARD adopted or enforced a code of ethics relating to the sale of prescription drugs by mail, caused any pharmacy to dispense forged prescriptions by mail, or attempted to make membership in NARD or any other pharmacy organization a precondition of pharmacy employment or of higher state pharmacy ratings. Plaintiffs allege that NARD has ousted from membership pharmacists who own or accept employment in a mail service or discount pharmacy and point to one instance in 1960 where a prescription company did lose its membership in NARD. This instance, however, lacks any appreciable significance. The publicity campaign which was conducted against the same pharmacy by the American Pharmaceutical Association ("APhA"), also a defendant in this case, did not precede, but rather followed NARD's actions by several months. Moreover, prior to

its ouster, the pharmacy in question had been advertising its affiliation with NARD and this advertising implicated NARD in the violation of a number of state statutes prohibiting prescription-by-mail advertising. Finally, NARD by affidavit denies that it ever ousted a pharmacist from membership for the reasons alleged in the complaint.

For these reasons, plaintiffs now solely rest their case against NARD upon four circumstances. Plaintiffs maintain that these instances demonstrate that NARD openly participated and conspired with APhA to injure the mail order prescription business. Plaintiffs further contend that none of the circumstances cited involved *Noerr*-protected activity; in other words, that the instances demonstrate a conspiracy with objectives falling outside the mantle of *Noerr*. The four circumstances, as shown by the record, are:

A. In 1960, NARD and APhA actively induced the American Medical Association to adopt a resolution opposing the dispensation of drugs by mail order houses.

B. In 1968, NARD and APhA, through an intensive publicity campaign, persuaded the Pharmaceutical Manufacturers Association ("PMA"), to retract a statement the latter had made in a critique of a Report of the United States Department of Health, Education and Welfare. The statement made by PMA had recommended that the extant legal barriers to prescription drug advertising be removed.

C. In 1972, counsel for NARD and counsel for APhA attended a meeting sponsored by several state pharmaceutical associations. At the meeting was discussed the associations' opposition to various suits which had been initiated by the Pathmark chain of stores challenging existing governmental restrictions on the advertising of

prescription drug prices. NARD provided the participants with a list of case precedents, but declined actively to participate any further in connection with the litigation because it perceived the defendant's position to be weak. Indeed, it appears that the NARD and APhA representatives expressed a belief that advertising might not damage the interests of pharmacists as much as some of the other participants assumed.

D. In 1973, NARD joined with APhA to form a Committee on Pharmacy Economic Security ("COPES") to promote and protect the professional and economic interests of pharmacists. The only apparent connection this organization ever had with the issue of mail order pharmacy was when NARD proposed that the issue be considered at one of the organization's meetings. In fact, the topic was never discussed.

(A) and (B) are protected by the *Noerr* doctrine. Plaintiffs contend that *Noerr* does not immunize joint attempts to enlist other organizations with allied interests to rally in a common publicity effort. Plaintiffs misread the law. The *Noerr* case dealt with a publicity campaign involving ostensibly "independent persons and civic groups," *Noerr, supra,* 365 U.S. at 130, 134, 140-42, and the use of "newspaper articles, editorials, magazine articles" and the like, *id.,* 365 U.S. at 142. The evidence here leaves no doubt that (A) and (B) were at least indirect attempts to influence governmental behavior.

(C) Most certainly does not fall within the category that encompasses "repetitive lawsuits carrying the hallmark of insubstantial claims and thus . . . within the 'mere sham' exemption announced in *Noerr.*" *Otter Tail Power Co. v. United States, supra,* 410 U.S. at 380. Indeed, (C) substantially undercuts the force of plaintiffs' claims.

(D) is utterly insignificant.

Nothing else of substance remains in the papers. Accordingly, summary judgment is granted to NARD.

/s/ Gerhard A. Gesell
United States District Judge

March 27, 1979.

## APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| FEDERAL PRESCRIPTION SERVICE, INC., *ET AL.*, Plaintiffs, | ) | |
| v. | ) | Civil Action No. 77-1163 |
| AMERICAN PHARMACEUTICAL ASSOCIATION, *ET AL.*, Defendants. | ) | |

[Filed Mar. 27, 1979 – JAMES F. DAVEY, CLERK]

### ORDER

For the reasons set forth in the Court's Memorandum Opinion, filed herewith, it is hereby

ORDERED that summary judgment is granted defendant National Association of Retail Druggists.

/s/ Gerhard A. Gesell
United States District Judge

March 27, 1979

# Opposition

Office - Supreme Court, U.S.
FILED
DEC 30 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-1043

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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FEDERAL PRESCRIPTION SERVICE, INC., *et al.*,
*Petitioners,*

v.

AMERICAN PHARMACEUTICAL ASSOCIATION,
*Respondent.*

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## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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PAUL L. O'BRIEN
MICHAEL H. MCCONIHE
ARTHUR D. MCKEY

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January 4, 1982

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly applied the rule established by this Court in *Noerr* and its progeny to the facts of this case.

2. Whether the Court of Appeals was correct in holding that the Petitioner has manifestly failed to prove the fact of damage as required by the antitrust laws.

3. Whether denial of Petitioners' claims for future damages and claims for individual damages was correct.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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FEDERAL PRESCRIPTION SERVICE, INC., *et al.*,
*Petitioners,*

v.

AMERICAN PHARMACEUTICAL ASSOCIATION,
*Respondent.*

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## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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## STATEMENT OF THE CASE

This case focuses upon the activities of the American Pharmaceutical Association ("Respondent"), the national professional society of pharmacists, relating to the dispensing of prescription drugs by mail order. These activities included lobbying before legislative bodies, petitioning law enforcement authorities to enforce existing laws and regulations, and supporting litigation to enjoin mail order pharmacy practices which were unlawful under state law and regulation. The Court of Appeals for the District of Columbia Circuit held in this case that all of these types of activities were privileged under the doctrine enunciated in *Eastern R.R. Conference* v. *Noerr Motor Freight*, 365 U.S. 127 (1961) and subsequent decisional authorities of this Court (hereafter referred to as the *Noerr* doctrine).

Because the facts of the case are largely undisputed, Respondent hereby adopts the statement of facts set forth in the Court of Appeals opinion below. (See Appendix to Petition for Certiorari at 3a-13a.)[1] Respondent is, however, compelled to

[1] It should be noted that the Appendix to Respondent's brief contains an error at p.12a-13a. The second full paragraph on p. 12a was not indented in the slip opinion published by the Court of Appeals.

address a portion of Petitioners' Statement of the Case which mischaracterizes the nature of this litigation.

The underlying issue in this case is not "whether residents of rural America should have access to discount drug services through mail service pharmacies," as Petitioners assert. Petition, at 3.[2] That issue is a political one, which in many instances has been decided by the various state legislatures as a matter of state law and regulation. As the Circuit Court forcefully pointed out, the Sherman Act was not designed to reform state law, and "[t]o hold otherwise would be to ignore the plain fact that the [Sherman] Act was not meant to regulate political activity." Petition, at 20a. The Petitioners were engaged in the mail order pharmacy business in numerous states in blatant contravention of state law. They cannot now invoke the sanctions of the Sherman Act against the Respondent based upon Respondent's efforts to have the relevant state agencies enforce those state laws.

As the Circuit Court stated in its opinion below:

> American [Respondent] cannot be held liable, then, for damages resulting from its genuine and legitimate attempts to secure government action, whether through financing lawsuits, lobbying legislatures, or petitioning administrative bodies.

Petition, at 28a.

## ARGUMENT

### I. THE COURT OF APPEALS PROPERLY HELD THAT THE "SHAM" EXCEPTION TO THE NOERR DOCTRINE DID NOT APPLY IN THIS CASE, AND SUCH HOLDING IS FULLY CONSISTENT WITH THE DECISIONAL AUTHORITIES OF THIS COURT.

It is undisputed that the *Noerr* doctrine stands for the proposition that the Sherman Act was designed to regulate

[2] References to the Petition for Writ of Certiorari in this case shall be referred to as "Petition, at ".

"business activity" and not "political activity." *Feminist Woman's Health Center* v. *Mohammad*, 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979). Even the direct infliction of harm on a competitor is not subject to the Sherman Act, so long as it is the aim of a publicity campaign to influence government action. In fact, this is precisely what occurred in *Noerr*. 365 U.S. at 139.

In *Noerr*, this Court foreshadowed the "sham" exception stating, "a publicity campaign, ostensibly directed toward influencing governmental action, [may be] a mere sham to cover what is actually nothing more than an attempt to interfere with the business relationships of a competitor." The parameters of the "sham" exception were more fully detailed in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972) where this Court said:

> [A] pattern of baseless, repetitive claims may emerge which leads the fact finder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result, *viz.*, effectively barring [plaintiffs] from access to the agencies and courts.

*Id.* at 513. Subsequent lower court decisions have made it clear that "[p]erjury, bribery and misrepresentations in the adjudicatory process corrupt it and effectively bar access to agency action or the courts," thus constituting "sham" type conduct. *Wilmorite, Inc.* v. *Eagan Real Estate, Inc.*, 454 F. Supp. 1124, 1130 (N.D.N.Y. 1977), *aff'd mem.* 578 F.2d 1372 (2d Cir. 1978) *cert. denied*, 439 U.S. 983 (1978).

The district court found that the vast majority of AphA's activities were protected under *Noerr*. It did find, however, that AphA's activities regarding the Iowa Board of Pharmacy Examiners ("Iowa Board") were not exempt under the *Noerr* doctrine. The Circuit Court reversed this holding, finding instead that there was no evidence of a denial of access to the

administrative processes or that the processes had been otherwise abused.[3] With respect to the Iowa Board, the Circuit Court held that the court below was "clearly erroneous" in its finding that Iowa Board members conspired with the Respondent. In so doing, the appellate court rejected Federal's contention that evidence of overlapping memberships on state regulatory boards and state pharmaceutical associations met the burden of proof of conspiracy under the Sherman Act. Petition, at 20a. The court stated:

> Federal also relies on the relationship between many state boards and the corresponding state pharmaceutical associations—in at least 14 states the board members, *as required by state law*, are selected from the memberships of the state pharmaceutical association; in many other states (such as Iowa) the law has provided that the board members be selected from a list compiled by the state association (emphasis added). . . .
>
> We hold as a matter of law that introduction of this evidence did not meet Federal's burden of showing that state board members participated in a conspiracy with the defendant.

*Id.* at 21a-22a. Petitioners now ask this court to greatly expand the scope of the "sham" exception urging that the Sherman Act be utilized to reform any state law or regulation which is in any way anticompetitive.

In responding to Petitioners' numbered arguments, we note at the outset that rather than specifying any errors committed by the Circuit Court of Appeals, the Petitioners simply reassert many of the arguments which were unequivocably rejected below.[4]

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[3] The Circuit Court characterized as "easily distinguishable" *Israel* v. *Baxter Laboratories, Inc.*, 466 F.2d 272 (D.C. Cir. 1972), which held that seeking to undermine fair and impartial functioning of an administrative agency by *misrepresentation* and *suppression of information* constituted a "sham."

[4] Additionally, it should be noted that Petitioners have included cases dealing with group boycotts under the Sherman Act within their argument on the "sham" exception to *Noerr*. These issues have been separately treated

(*footnote continues*)

1. Petitioners first argue that the appellate court wrongly applied the state action doctrine enunciated in *Parker* v. *Brown*, 317 U.S. 341 (1943) and *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976). The latter case is clearly inapposite. In *Cantor*, a private utility attempted to justify its antitrust conduct on the basis that it had received the approval of a state regulatory agency and was thus immune under the *Parker* doctrine. As this court noted in *Cantor*:

> In this case, unlike *Parker*, the only defendant is a private utility. No public officials or agencies are named as parties and there is no claim that any state action violated the antitrust laws.

428 U.S. at 591. It does not appear to have any bearing on any fact or issue in this case.

*Parker* v. *Brown, supra*, is mentioned only in passing by the court below and only for the following proposition:

> Federal contends that these boards in inhibiting mail order pharmacy necessarily act in their commercial self-interest, and that the antitrust laws require licensing authorities to be free of commercial bias. Our own view of the antitrust laws is not so expansive. However desirable might be the goal of ridding government of the appearance of catering to special interests, the Sherman Act was not designed to achieve it. The composition of a state board of pharmacy is determined by state law, and is a matter to be corrected, if correction be needed, through the political process, not by application of the Sherman

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(*footnote continued*)

throughout this case, as they properly must be. As evidenced by the Circuit Court's opinion, the group boycott cases are inapposite in determining whether the sham exception applies. The confusion engendered by Petitioners' intermingling of these issues is sufficient basis for denying the petition for certiorari. Supreme Ct. Rule 23(4). "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

> Act. To hold otherwise would be to ignore the plain fact that the Act was not meant to regulate political activity. *E.g., Parker* v. *Brown*, 317 U.S. 341 (1943), *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

Petition, at 20a.

This holding of the Court of Appeals is undeniably correct. Clearly the Sherman Act cannot be invoked to impose liability where a plaintiff feels it is damaged as a result of duly enacted laws or regulatory policies.

Petitioners have apparently based their leading argument on a passing reference by the Circuit Court to *Parker* v. *Brown*, *supra*. In so doing, Petitioners have ignored the wealth of authority concerning the "sham" exception which forms the basis of the opinion below. This does nothing more than generate considerable confusion (see footnote 3, *supra*).

2. Petitioners' second argument is so contrary to the prior decisions of this Court that it merits little comment. Petitioners are apparently arguing that Respondent's lobbying efforts to have anticompetitive legislation adopted were unlawful under the Sherman Act. The Circuit Court rejected this contention out of hand stating:

> Federal maintains that "the difference between protected activity and sham action depends on the competitive or anticompetitive purpose of exercising the right of petition and ... evidence of such a purpose is a pattern of actions designed to accomplish the destruction of a competitor." Appellee's brief at 31. *That, plainly, is not the law.* Anticompetitive intent alone is not enough. Nor is it sufficient that the persons engaged in lobbying activity also engaged in "a pattern of actions." Both factors were present in *Noerr*, in which the Court held the complained of activities were beyond the scope of the antitrust laws. (emphasis added)

Petition, at 17a.

As this Court clearly pointed out in *Noerr*, "no violation of the Act can be predicated upon mere attempts to influence the

passage or enforcement of laws," 365 U.S. at 135. This is true even if such laws would produce a restraint or monopoly. This Court reasoned that

> [i]n a representative democracy such as this, these branches of government [, legislative and executive,] act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. *Id.* at 137.

The Sherman Act was intended to regulate business, not politics. Furthermore, the exercise of the First Amendment right to petition the government could be jeopardized by imposing antitrust liability in these circumstances. *See Franchise Realty Corp.* v. *San Francisco Board*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977) and *Wilmorite, Inc.* v. *Eagan Real Estate, Inc.*, 454 F. Supp. 1124 (N.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1372 (2d. Cir.), *cert. denied*, 439 U.S. 983 (1978).

3. Petitioners' third argument is largely incomprehensible. Petitioners once again put forth the rejected argument that anticompetitive intent alone establishes a "sham." As stated in the petition, "when [anticompetitive] intent has been shown, any injury from the instigated action is not exempted . . . . " Petition, at 15.

Petitioners further argue that APhA and The National Association of Boards of Pharmacy (NABP) acted in concert to prohibit mail order distribution of prescription drugs. In rejecting this claim on appeal, the Circuit Court analyzed extensively the complex relationships among the various organizations involved, Petition, at 20a-24a, and held "as a matter of law that introduction of this evidence did not meet Federal's burden of showing that state board members participated in a conspiracy with the defendant." Petition, at 22a. Throughout this litigation, Petitioners have attempted to establish "guilt by association" based on overlapping membership in various organizations. The Circuit Court correctly rejected this contention noting that in many states these relationships were

mandated by state law. For example, board members were required to be selected from among the members of state pharmaceutical associations.[5] Petitioner manifestly failed to prove conspiracy under the antitrust laws, and its argument that state laws and regulations should be effectively amended or appealed by application of the Sherman Act was correctly rejected by the Circuit Court.

4. Petitioners' fourth and seventh assertions involve the same legal issue and therefore are addressed together. Petitioners apparently argue that when the governmental body sought to be influenced is in fact persuaded to act as requested, it becomes a co-conspirator and the antitrust laws may be applied to their conduct as well as to the lobbying entity. Such an assertion is unprecedented. Never before has any court found an *independent* administrative board acting in a regulatory capacity to be a co-conspirator under the Sherman Act. *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U.S. 690 (1962), cited by Petitioners involved a defendant's *wholly owned subsidiary* being designated as the licensing authority for a Canadian province. Such subsidiary was not a government agency, and the case is clearly distinguishable. Moreover, Petitioners' contention that a successfully lobbied regulatory board becomes an antitrust co-conspirator is not supported by the cited authority or any other authority known to the Respondent.

Furthermore, the Circuit Court correctly held that the trial court was "clearly erroneous" in finding that the members of the Iowa Board conspired with Respondent. With respect to this finding, Petitioners are apparently invoking the "membership ratification" theory (in reverse). Petitioners argue that because *state* association members acted in conjunction with the Iowa Board to police mail order activities, that this constitutes evidence of conspiracy with the Respondent herein, the

[5] Elsewhere the court below stated, "The composition of a state board of pharmacy is determined by state law, and is a matter to be corrected, if correction be needed, through the political process, not by application of the Sherman Act." Petition, at 20a.

national association. This assertion was rejected by the Circuit Court as follows:

> Under the membership ratification theory, liability is imposed upon members of an association who knowingly acquiesce in its unlawful conduct.[12] Applied here, this theory would, at most, make individual members of some state boards liable for the conduct of the National Association of Boards of Pharmacy or the relevant state pharmaceutical association. We are not aware of a case in which the theory was held to work backwards, and make the association liable for the conduct of individual members. [Footnote omitted.]

Petition, at 23a.

5. Petitioners' fifth argument is clearly without merit. The court below succinctly stated Petitioners' argument and properly disposed of it by stating:

> Private efforts to influence governmental bodies acting in an *economic* rather than a *political* framework, *e.g.*, a governmental procurement agency, have been held unprotected by *Noerr* because these efforts, in *Noerr's* terms, constitute "business activity" rather than "political activity."[10] Here, by contrast, *Noerr* is fully applicable, for the boards of pharmacy are charged with making regulatory decisions rather than commercial decisions. (emphasis added; footnote omitted)

Petition, at 19a-20a. Petitioners continue to ignore the distinction between economic or proprietary agencies and those which are political and regulatory and therefore entitled to *Noerr* protection. See *e.g. Hecht* v. *Pro Football, Inc.*, 444 F.2d 931, 940-42 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (football team bargaining for a restrictive covenant in lease with government-owned football stadium not immune from antitrust suit by virtue of *Noerr*); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25, 33 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970) (*Noerr* does not protect efforts to influence "public officials engaged in purely commercial dealings" and charged with the task of making "gov-

ernment purchases ... according to strictly economic criteria."), *In Re Airport Car Rental Litigation*, 474 F. Supp. 1072, 1091 (N.D. Cal. 1979), *rev'd.*, F.2d (9th Cir. 1981) (those seeking to influence airport authorities in charge of licensing car rental operations were not entitled to antitrust immunity under *Noerr* because the authorities were "acting as a commercial entity influenced by economic concerns rather than as a policymaking unit of government." The ninth circuit held that defendant's activities were *Noerr* protected); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 707-08 (1962) (Companies who influenced a private corporation acting as Canada's purchasing agent to exclude plaintiff from the relevant market were not immune under *Noerr* because they were "engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws.").

6. Finally, Petitioners argue that a lawsuit initiated by the Massachusetts Pharmaceutical Association was not protected by *Noerr*. Both the District Court and the Circuit Court found that there can be no showing that the claim was baseless or frivolous as required by *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972). And once again, petitioners' argument is based on their often repeated misstatement of the law that anticompetitive intent, standing alone, may form the basis for antitrust liability. Petition, at 23.[6]

In conclusion, Petitioners' *Noerr* doctrine arguments are conclusory in nature and fail to meaningfully address any purportedly wrongful holding of the Court of Appeals. There is no contradiction between the prior decisions of this Court which define the "sham" exception and the carefully reasoned, well supported decision of the appellate court. Clearly, this issue is not one requiring review by this Court.

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[6] Petitioner raises an additional argument concerning the dismissal of the National Association of Retail Druggists ("NARD") as a defendant. While this Respondent, the American Pharmaceutical Association, is not here concerned with that issue, we note in passing that the issue was not raised on appeal and NARD did not participate in the Circuit Court. Therefore, consideration of this issue by this Court may be inappropriate.

## II. THE APPELLATE COURT PROPERLY DETERMINED THAT FEDERAL FAILED TO SHOW WITH "REASONABLE CERTAINTY" THAT IT SUFFERED ANY COMPENSABLE INJURY RESULTING FROM THE CONDUCT OF THE RESPONDENT

On review, the Circuit Court overturned the district court's holding that Federal in fact suffered injury resulting from the Respondent's conduct. It determined that this holding of the district court was clearly erroneous in that the evidence found by the district court failed to establish to a "reasonable certainty" that any injury to Federal in fact resulted from any identifiable conduct of the Respondent. Petition, at 29a.

In part II of their Petition, the Petitioners apparently claim that the appellate court erred in arriving at this conclusion, but they fail to specify the nature of the error. They simply state that "[i]t is Federal's position that it did make proof of *some* damage . . .", Petition, at 25, but nowhere do they identify either the damage or the conduct which allegedly caused it. Before the Circuit Court, the Petitioners stated that the fact of injury was a "self-evident conclusion." Petition, at 35a. In their petition to this Court, they say essentially the same thing. They recognize that "some items of [their] proof are admittedly drawn from reasonable inference", Petition, at 28, but again they fail to identify any specific injury or casual link allegedly overlooked by the appellate court.[7]

In reviewing this aspect of the case, the Circuit Court carefully delineated the proper legal test to be applied—

> Courts have recognized "a clear distinction between the measure of proof necessary to establish the fact that [the antitrust plaintiff] ha[s] sustained some

[7] When the appellate court examined these "reasonable inferences," it found them to be unreasonable. For example, Petitioners contend that as a consequence of Respondents' opposition to prescription drug advertising by its members, it may be inferred that such conduct adversely affected Federal's business. The appellate court logically concluded that "In fact, to the extent American's Code restrained advertising of Federals' competitors, it presumably benefitted Federal". Petition, at 36a.

> damage, and the measure of proof necessary to enable the [factfinder] to fix the amount." *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931). The quantum of damages "can be estimated on any reasonable basis," but first the "fact of injury" must be "certainly proved." *Poster Exchange, Inc.* v. *National Screen Service Corp.*, 431 F.2d 334, 340 (5th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971).

Petition, at 30a.

Even the Petitioners recognize that this is the proper test, Petition, at 25, and despite Petitioners' assertions to the contrary, *Zenith Radio Corp.* v. *Hazeltine Research*, 395 U.S. 100 (1969), does not change this basic test of causality.[8]

The Circuit Court then reviewed in detail the findings of the district court and the trial record, not for the purpose of deciding the factual issues *de novo* as suggested by the Petitioners, Petition, at 27, but for the purpose of determining whether the facts as found by the district court support its conclusion

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[8] *Zenith* quite logically does not require "concrete, detailed proof of injury" in a market exclusion case where such proof is not in existence. In *Zenith*, existing legal precepts are applied to a specific situation, i.e. a market exclusion case, and no change in the law was contemplated:

> *The Court has repeatedly held* that in the absence of more precise proof, the factfinder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiff's business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs." *Bigelow* v. *RKO Pictures, Inc.*, *supra*, at 264, 90 L.Ed. at 660. See also *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 377-379, 71 L. Ed. 684, 690, 691, 47 S. Ct. 400 (1927); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 561-566, 75 L. Ed. 544, 547-550, 51 S. Ct. 248 (1931). (emphasis added)

*Zenith Radio Corp.* v. *Hazeltime Research*, 395 U.S. 100, 123-4 (1969). The "absence of more precise proof" language focused on by Petitioners obviously refers to the *unavailability* of more precise proof, not to the plaintiffs' total failure to provide any proof at all, thereby leaving the District Court to concoct its own theories unsupported by evidence.

In performing its review, the appellate court applied the proper legal standard to the facts found by the district court and determined that the district court's conclusion was wholly unsupported by the objective evidence and therefore clearly erroneous. Its detailed analysis of the district court's findings will not be reiterated here. See Petition, at 30a-38a.

Petitioners do no more in their petition to this Court than they did at the appellate level. Their continued incantation that they have proved their case, without more, neither makes their case nor justifies further review.[9]

The standard for determining "injury in fact" in an antitrust case is not satisfied, as suggested by Petitioners, by a "self-evident conclusion." The correct test and the one applied by the court of appeals is whether Federal had proven that any injury it had purportedly suffered resulted, to a reasonable certainty, from any illegal conduct of the antitrust defendant, e.g. *Story Parchment Co.* v. *Paterson Paper Parchment Co.*, 282 U.S. 555 (1931).

There is no contradiction between the decision of the appellate court and prior decisions of this Court. Further, there is no significant departure from other court rulings on the same subject. To the contrary, the decision of the appellate court is consistent with the usual course of judicial proceedings, and it is not the type of decision requiring review by this Court.

## III. PETITIONERS' CLAIM OF ERROR FOR THE DISTRICT COURT'S REFUSAL TO AWARD FUTURE DAMAGES IS MERITLESS AND NOT WORTHY OF REVIEW BY THIS COURT

Petitioner's failure to establish any past injury attributable to illegal conduct of the Respondent extends also to its claim of injury in the future. In brief, Petitioners claimed at trial that they were entitled to an award of damages into the indefinite

[9] The Petitioners have the burden of furnishing the best available evidence as to the impact of claimed illegal conduct on its business. *Riss and Co.* v. *Ass'n of American Railroads*, 190 F. Supp. 10, 18 (D.D.C. 1960).

future as a consequence of injuries suffered in the past. The district court refused to award such damages on the basis that any future losses suffered by Federal should be attributed to market conditions in the mail order pharmacy business rather than to the effects of an antitrust conspiracy and were accordingly too speculative. Petition, at 76a-77a. The Circuit Court, having concluded that Federal suffered no past antitrust injury, did not address the question of future injury.

While Respondent concurs with the general legal precepts cited by Petitioners to the effect that future damages may be awarded in appropriate cases, this is obviously not such a case, and Petitioners offer no coherent explanation for their statement that "rejection of Federal's claim for future damages was clearly error as a matter of law." Petition, at 30.

As properly determined below, the trial record is devoid of any credible evidence indicating that Federal will suffer any antitrust type injury in the future, and there is no evidence regarding the appropriate measure of any future injury.[10]

Furthermore, an issue of this type, sufficiency of evidence at the trial level, is certainly not one deserving of review by this Court.

## IV. PETITIONERS' CLAIMS FOR INDIVIDUAL DAMAGES WERE PROPERLY DENIED BY BOTH THE DISTRICT AND THE CIRCUIT COURT

The district court denied recovery to the individual plaintiffs for claimed injury stating "no cognizable damages were proven by any of the individual plaintiffs." Petition, at 80a. There was a total failure of proof. Petitioners, in support of their individual claims, offered only their unsupported and unjustified beliefs as estimates of the injury they claimed to have suffered and its amount. The Circuit Court determined, without discussion, that the district court's analysis was correct. Petition, at 38a.

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[10] Petitioners' primary evidence consisted of testimony from an expert as to which district court found,

> "Plaintiffs expert was biased. No reliance can be placed upon his computations purporting to show loss of past or future profits."

Petition, at 72a-73a.

As with their other damage claims, the Petitioners contend that "*some* evidence of injury" was given. The evidence on this point may be fairly characterized as the moans and groans of disheartened individuals.[11] The Petitioners' assertion that this "*some* evidence" meets the standard of proof required by *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931); *Zenith Radio Corp.* v. *Hazeltime Research, supra;* and *Poster Exchange, Inc.* v. *National Screen Service Corp.*, 431 F.2d 334, 340 (5th Cir. 1970), certainly lays bare the absurdity of their position. The evidence does not even relate to injury to Petitioners' business or property as the district court properly found. Petition, at 79a. This matter certainly does not warrant review by the Court.

## CONCLUSION

For the reasons set forth, Respondent, American Pharmaceutical Association, respectfully requests that the petition for Certiorari be denied.

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[11] Petitioners admit, as they must, that the *only* evidence offered was "self interested testimony" and "the *ipse dixit* testimony of the three." Petition, at 30.

# Amicus Brief

JTION FILED
JAN 6 1982

81-1043

IN THE

# Supreme Court of the United States

October Term, 1981

No.

FEDERAL PRESCRIPTION SERVICE, INC., *et al.*,
*Petitioners,*

*against*

AMERICAN PHARMACEUTICAL ASSOCIATION,
*Respondent.*

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF NATIONAL ASSOCIATION OF MAIL SERVICE PHARMACIES

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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No.

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FEDERAL PRESCIPTION SERVICE, INC., *et al.*,

*Petitioners,*

*against*

AMERICAN PHARMACEUTICAL ASSOCIATION,

*Respondent.*

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## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND STATEMENT OF INTEREST OF *AMICUS CURIAE*

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The National Association of Mail Service Pharmacies (the "Association") respectfully moves the Court, pursuant to Rule 36 of the Rules of the United States Supreme Court, for permission to file the attached brief *amicus curiae* on a Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. The grounds for this motion, which also disclose the interest of the *amicus*, are set forth below.

The Association is a trade association of several mail service pharmacies. It was formed in 1978 out of the specific need of such pharmacies to band together in an effort to repel a massive anticompetitive assault being mounted by over-the-counter pharmacies and their trade association, respondent American Pharmaceutical Association ("APhA").

For almost a dozen years, APhA and its members had been engaged in a conspiracy to wipe out the fledgling mail order pharmacy business—for no purpose other than to eliminate a source of competition which had brought innovative and cost-

effective new techniques to the marketing and delivery of prescription drug products. Despite the fact that mail order pharmacies serviced principally the elderly and those residing in rural areas—people for whom it was either physically impossible, greatly inconvenient or unnecessarily expensive to travel to retail pharmacies—APhA and its members would not accept even this minimal infringement on the monopoly which they theretofore had possessed in the distribution of drug products. They therefore conspired to use all means available and necessary to eliminate this new source of competition, regardless whether such means were proscribed by the antitrust laws. As the District Court stated:

> "The proof clearly shows a group boycott arranged primarily for economic anticompetitive reasons among conspirators with sufficient power and influence in the market to make it effective. In addition to *general opposition to mail order pharmacies* the boycott was specifically directed against [petitioner]. The conduct of APhA and its co-conspirators had the intended and necessary effect of excluding or impeding [petitioner] *and other mail order pharmacies* from access to retail customers. Such conduct . . . constituted a per se violation of the Sherman Act."[1] (emphasis supplied)

The District Court made clear that while petitioner was the principal initial target of the conspiracy spearheaded by APhA, that conspiracy was directed against and affected *all* mail service pharmacies, many or most of whom are members of the Association. Therein lies the interest of *amicus* Association in this matter.

The District Court held that APhA had violated the antitrust laws and held it liable for the damages caused to petitioner thereby, although in an amount which we believe to be greatly

1. Appendix C to the Petition, p. 63a.

insufficient. The Circuit Court did *not* reverse the holding that the antitrust laws had been violated; rather, it simply relieved APhA from any liability for its actions.

The Circuit Court effectively has given APhA and its co-conspirators *carte blanche* to continue to violate the antitrust laws without fear of incurring liability for so doing. If the Circuit Court decision is permitted to stand, there can be no question but that APhA and its co-conspirators will redouble their efforts to drive out of business not only petitioner but all other mail service pharmacies, including the members of the Association, as well; and that APhA and its co-conspirators will be emboldened to violate the antitrust laws even more egregiously than they have done so already.

The *amicus* has been unable to obtain the consent of the respondent to the filing of the attached brief, thus necessitating this motion.

WHEREFORE, the Association respectfully moves for permission to file the attached brief *amicus curiae* in support of the Petition for a Writ of Certiorari.

Respectively submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

No.

FEDERAL PRESCRIPTION SERVICE, INC., *et al.*,

*Petitioners,*

*against*

AMERICAN PHARMACEUTICAL ASSOCIATION,

*Respondent.*

## BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

### INTRODUCTION

Over the past several years, the established pharmaceutical industry in this country, consisting of both the major drug manufacturers, and their trade associations, and the local practitioners of pharmacy, and their trade association, respondent American Pharmaceutical Association ("APhA"), have mounted a three-pronged campaign to maintain the exorbitantly high prices which consumers historically have been compelled to pay for prescription drug products.

The first element of this campaign was the adoption of regulations, or promotion of state statutes, by state boards of pharmacy—most, if not all, of which are staffed predominantly by members of APhA—prohibiting pharmacists from publishing the prices of prescription drugs. Such prohibitions effectively eliminated the possibility of comparison shopping, with the result that physicians prescribed, and consumers purchased, the better-known, better-advertised and far more expensive—though no more effective—brand name drugs. In *Virginia State Board of*

*Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), this Court held such prohibitions to be violative of the First and Fourteenth Amendments.

The second element of the campaign involved repeated challenges to state "generic drug substitution laws"[1]—laws which either permit or require pharmacists to substitute cheaper generic equivalents for prescribed brand name drugs. In connection with these attacks on generic substitutes, several brand name drug manufacturers have brought actions against manufacturers of generics, claiming that the generic manufacturers' imitation of the size, shape and color of the brand name product constituted "contributory trademark infringement" in violation of Section 32 of the Lanham Act. In *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 638 F.2d 538 (2d Cir. 1981), the Second Circuit upheld such a claim. However, on October 13, 1981, this Court agreed to hear Ives' appeal from the Second Circuit decision. Thus, two of the elements of the campaign conducted by respondent and its co-conspirators have been or will be subject to review by this Court.

The final element of that campaign is presented here—namely, a broadside attack on cost-effective innovations in the marketing and delivery of drug products. Distribution of prescribed drugs by mail service provides both convenience and, more importantly, savings, to those who need it most. The overwhelming majority of customers of mail service pharmacies are the elderly—often the bed-ridden or immobile elderly—and those residing in rural areas; people who are either physically unable to have their prescriptions filled in any other manner, or who may do so only by incurring what it is to them significant additional costs for transportation. And the overwhelming majority of drug products dispensed by mail service pharmacies are generics, the least expensive, effective products available.

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1. *See, e.g., Pharmaceutical Soc. of State of N.Y.* v. *Lefkowitz*, 586 F.2d 953 (2d Cir. 1978); *Pharmaceutical Manufacturers Assoc.* v. *Whalen*, ___ NY2d ___ (N.Y. Ct. of Appeals, December 22, 1981).

# ARGUMENT

## I

## THE CIRCUIT COURT DECISION SANCTIONS RESPONDENT'S PAST ANTI-COMPETITIVE PRACTICES AND ENCOURAGES FUTURE SUCH PRACTICES

It is unfortunate that respondent and its co-conspirators deemed it necessary to maintain their extravagant profit margins at the expense of those elderly and rural Americans least able to afford it. Yet, for a dozen years or more respondent and its co-conspirators have engaged in an unconscionable crusade to preserve their competitive edge, and to eliminate from the marketplace new and innovative forms of competition designed to reduce the cost of prescription drugs for those Americans least able to pay for them but most in need of them. As the District Court stated:

> "The proof clearly shows a group boycott arranged primarily for economic anticompetitive reasons among conspirators with sufficient power and influence in the market to make it effective."[2]

The Circuit Court, in reversing, did not disagree. It stated that "the evidence may support a conclusion that [respondent] engaged in a number of activities violative of the spirit of the antitrust laws. . . ."[3] Yet, because these activities ultimately led to some purported "governmental action", the Circuit Court relieved respondent of any liability for its improper conduct.

The Circuit Court decision gives respondent a green light to continue against petitioner and all other mail service pharmacies the same "group boycott arranged primarily for economic anticompetitive reasons. . . ." In so doing, it dangerously expands and distorts the limited exception to the anti-trust laws set forth by this Court in *Eastern Railroad Presidents' Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), as more specifically detailed in petitioner's brief. And in so doing, it strikes a

2. Appendix C to the Petition, p. 63a.
3. Appendix A to the Petition, p. 38a.

blow against the efforts of all those who have labored so long in so many different arenas to make affordable, for those most in need, life-sustaining prescription drug products.

## CONCLUSION

This Court consistently has agreed to review challenges to practices of the established pharmaceutical community which are anticompetitive in nature and which are designed to maintain the current high cost of prescription drug products; no doubt at least in part because of the serious consequences to consumers of such practices. The practices of respondent in issue here are no less anti-competitive and the consequences to consumers no less serious. This action is equally deserving of review by this Court.

WHEREFORE, *amicus* respectfully requests that the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit be granted.

Respectfully submitted,

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Dated: January 4, 1982
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